

RECEIVED

Jul 19 2023

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

Honorable H. Steven DeBerry IV, Circuit Court Judge

ALQI DHIMO,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000525

APPENDIX

WANDA H. CARTER
Deputy Chief Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201
(803)734-3372

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
TRIAL TRANSCRIPT DATED JULY 31, 2017	1
APPLICATION FOR POST-CONVICTION RELIEF	99
RETURN AND MOTION FOR A MORE DEFINITE STATEMENT	106
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED NOVEMBER 30, 2022.....	117
ORDER OF DISMISSAL.....	174
INDICTMENTS	187

STATE OF SOUTH CAROLINA) TRANSCRIPT OF RECORD
COUNTY OF HORRY) CASE NO.: 2015-GS-26-04000

July 31, 2017

BEFORE: The Honorable Steven H. John

THE STATE OF SOUTH CAROLINA,

Plaintiff,

vs.

ALQI DHIMO,

Defendant.

 ORIGINAL

APPEARANCES:

Mary Ellen Walter, Esq.
Leigh Andrew, Esq.
Attorneys for the Plaintiff.

John Reuben Long, II, Esq.
Attorney for the Defendant.

Official Court Reporter
Natalie Dahl, RPR

I N D E X

JACKSON v. DENNO HEARINGCAROL ALLEN

Direct Examination by Ms. Walter.....	33
Cross-Examination by Mr. Long.....	38
Redirect Examination by Ms. Walter.....	43

HUGH JONES

Direct Examination by Mr. Long.....	47
Cross-Examination by Ms. Walter.....	57
Redirect Examination by Mr. Long.....	63
Examination by the Court.....	65
Redirect Examination by Mr. Long.....	68

E X H I B I T S

STATE'S		ADMITTED
Exhibit 1	Miranda form	38
Exhibit 2	Unredacted interview (DVD)	37
Exhibit 3	Redacted interview (DVD)	37
Exhibit 7	Body-cam video (DVD)	--
Exhibit 8	Search Warrant	58
Exhibit 9	Witness statement	63
Exhibit 36	Incident report	69
Exhibit 37	Investigative report	69

1 (State's Exhibits 1-3, 7-9, 36-37 marked.)

2 P-R-O-C-E-E-D-I-N-G-S

3 THE COURT: State versus Alqi Dhimo. Is the
4 State ready to go forward with those motions?

5 MS. WALTER: Yes, Your Honor. The only issue
6 would be on the motion that requires live testimony, I
7 would request that we do those later.

8 THE COURT: After lunch?

9 MS. WALTER: Yes, please.

10 THE COURT: What motions would those be?

11 MS. WALTER: That would be the Jackson v. Denno
12 hearing and the defense's motion to suppress if
13 Mr. Long carries his burden first.

14 THE COURT: Okay. Are there any other motions
15 that have been filed by the defense that the State and
16 the defense have been able to resolve?

17 MS. WALTER: I believe there were several where
18 the State agreed. So, for instance, the defense
19 motion in limine for exclusion of the victim's
20 interview.

21 THE COURT: All right. So why don't we -- all
22 right. Let's find the particular motion so we're on
23 the same page.

24 Mr. Long, I think this is dated July 18, 2017
25 that you are moving before the Court for excluding any

1 and all recorded statements of the victim, and based
2 upon the fact that the victim is deceased, passed on
3 and unavailable for cross-examination; is that
4 correct?

5 MR. LONG: Yes, sir, Your Honor.

6 THE COURT: So to that particular -- to that
7 particular motion, is the State in agreement with that
8 motion?

9 MS. WALTER: Yes, Your Honor. As we noted in our
10 response, we do not intend to introduce the reporting
11 of the victim's interview; however, we plan to ask
12 Detective Jones if he interviewed her and what her
13 demeanor was during that interview.

14 THE COURT: So that you intend to ask that the
15 interview was conducted, not the results of the
16 interview, and that during the interview, on whatever
17 date it occurred, this is how she appeared before the
18 detective?

19 MS. WALTER: Correct. An interview took place,
20 the subject -- essentially, why were you questioning
21 her, and then her demeanor during the interview, but
22 nothing that she said.

23 THE COURT: All right. Any objection to that,
24 Mr. Long?

25 MR. LONG: Yes, sir, Your Honor. Just that if

1 Detective Jones or anyone else was to testify as to
2 her demeanor at the time of the interview, that that
3 would be hearsay, because she was making a statement
4 with her assertions were nonverbal contact that was
5 intended to prove the truth of the matter asserted.

6 THE COURT: What is the State's response.

7 MS. WALTER: If the testimony is as the State
8 believes it will be, is that she was crying
9 uncontrollably. It is not an assertion. It is not a
10 statement. It is not verbal conduct. It is an
11 observation by Detective Jones. Demeanor is all about
12 Detective Jones' observations.

13 THE COURT: Mr. Long, I don't -- I'm going to
14 allow the detective to state that he conducted an
15 interview with her, on whatever date and time he
16 conducted the interview, where the interview took
17 place. I will allow him to testify as to what he
18 physically observed about the victim, not anything she
19 said, not any of her responses, not any kind of
20 indication from the detective as to belief in any
21 shape, manner or form. I will allow him to say that
22 he conducted an interview with her on a certain date
23 and time, and how the subject of the interview was --
24 what, if anything, occurred on the dates alleged in
25 the indictment, and then her demeanor, that is, how

1 she appeared before him. All right?

2 MS. WALTER: And the detective has already been
3 instructed to that.

4 THE COURT: And that would be -- now, in any
5 response to cross-examination, if the question does
6 not require a response that would indicate something
7 the victim was saying or his belief as to what the
8 victim was saying, and that is basically placed in the
9 answer, I'll hear from you and whatever you believe
10 your motions would be at that point in time.

11 MR. LONG: Yes, sir. And if I could, just what
12 Ms. Walter was saying, is that he may testify she was
13 crying uncontrollably. That type of adjective, I
14 mean, I can't cross-examine uncontrollably.

15 THE COURT: Well, I think, you know, we need to
16 be careful, but you can -- I think you can -- visibly
17 upset, crying. I mean, if the person in front of her
18 -- in front of him is visibly shaking or whatever the
19 physical attributes are, okay. Now, a statement as
20 to -- uncontrollably, that could border on a comment
21 by the detective, but statements as to physically what
22 is going on in front of him, I'm going to allow him to
23 testify about that. So if she's crying, shaking,
24 whatever is physically going on with her, whatever is
25 happening in front of him, that he can relay, then I

1 will allow him to say that.

2 MS. WALTER: Your Honor, next, and in a similar
3 vein, defense's motion in limine redaction of victim's
4 sexual assault statement. This relates to the portion
5 of the document entitled "Sexual Assault Examination
6 Protocol" where the nurse essentially summarizes what
7 the victim has said happened to her. The State agrees
8 -- number one, we're not planning on introducing the
9 actual document, "Sexual Examination Assault
10 Protocol," and even if we were, we would certainly
11 redact the victim's statement, because it would be an
12 out-of-court statement offered for the truth of the
13 matter asserted.

14 THE COURT: The nurse in question, as I
15 understand it, her name is Ms. Hennig-Ryan?

16 MS. WALTER: Yes. I have a witness list actually
17 for the court reporter.

18 THE COURT: It says Nurse Emily H-E-N-N-I-G,
19 dash, Ryan. So I certainly have no issues with that
20 statement, correct?

21 MR. LONG: Yes, sir.

22 THE COURT: But since we're talking about Emily
23 Hennig-Ryan, do you have a motion regarding any
24 testimony by this particular individual; is that
25 correct?

1 MR. LONG: Correct, Your Honor.

2 THE COURT: Let's talk about that now, then.

3 MR. LONG: In the same area, ballpark, as we just
4 talked about with Detective Jones. I do believe that
5 any representation that Ms. Hennig-Ryan gives toward
6 the demeanor or conduct of the victim will be
7 nonverbal contact intended as an assertion by the
8 victim and, therefore, that would be inadmissible
9 hearsay under State versus Griffith.

10 THE COURT: All right. So let me -- give me
11 parameters, Solicitor, as to the intention of the
12 State regarding her testimony.

13 MS. WALTER: The State intends to call Ms.
14 Hennig-Ryan to -- essentially it would be where are
15 you employed, how are you employed, were you working
16 as a nurse on June 22, 2015, did you examine a woman
17 you came to know as Jessica Kessler, can you describe
18 what you did during that examination. So simply how
19 she went about collecting the different samples. Did
20 you speak with Ms. Kessler during this examination?
21 Can you describe her demeanor? Again, Ms.
22 Hennig-Ryan, I spoke with her and she's been told not
23 to mention any statements made by Ms. Kessler, but the
24 State certainly believes that she would be able to
25 testify to what she actually did and any observations

1 she made.

2 THE COURT: All right. So I don't have an issue
3 with the State calling Ms. Hennig-Ryan to come before
4 the jury and testify as to, first, her occupation,
5 where does she work, what does she do, how long has
6 she been so employed by the particular hospital, what
7 her duties entail, what are her duties given to her by
8 her employer, and as a result of that, she saw the
9 alleged victim, Jessica Kessler, on a certain date and
10 time. I will allow her to physically describe what
11 she actually did, what she did -- assuming -- yes,
12 sir.

13 MR. LONG: I'm sorry, when you said "what she
14 did," you are talking about --

15 THE COURT: I'm talking about what the nurse,
16 Emily Hennig-Ryan, did. What Ms. Ryan did when she --
17 in the performance of her duties was assigned to this
18 particular patient, because I'm assuming she would
19 have talked about that previously. I have this
20 particular job responsibility given by my employer,
21 and as a result of that, I saw on a certain date and
22 time the alleged victim, Jessica Kessler, and as a
23 result of that, I did X, Y and Z. I will allow
24 Ms. Emily Hennig-Ryan to testify as to what, again,
25 she physically observed. I'm taking this as an

1 example. I don't know what her testimony is. If for
2 some reason there was some, you know, deep gouges on
3 her left arm, or whatever it is, that she physically
4 observed, some open wound on her head, or whatever it
5 is, if she physically observed it, I will allow her to
6 testify that, you know, during the course of my
7 examination, I examined Ms. Jessica Kessler and I
8 found X, Y and Z, and this is what I did, X, Y and Z.
9 But at no point in time would I allow the -- Ms. Ms.
10 Hennig-Ryan to testify as to anything that Ms. Kessler
11 indicated to her that would be -- and of course
12 inadmissible hearsay testimony.

13 Again, if there is some physical manifestations
14 during the examination of Ms. Kessler, that the nurse
15 grabs her left arm and as a result of that, you know,
16 Ms. Kessler jerks it away from her, then whatever she
17 physically observed, I'm going to allow her to do that
18 and testify. That comes as a result of her duties and
19 responsibilities given to her by her employer. Again,
20 not if she would know the results of any of the tests
21 and/or anything that Ms. Kessler said or told to her.

22 Further restrictions requested by the defense?

23 MR. LONG: No. I think that is adequate, thank
24 you.

25 THE COURT: Very good. Do you believe we are

1 clear, Solicitor, as to the limitations of the
2 testimony of Ms. Emily Ryan?

3 MS. WALTER: Yes, Your Honor.

4 THE COURT: All right. Do you know of any other
5 motion that there is at least some partial agreement
6 on or not?

7 MS. WALTER: I do. The defense's motion in
8 limine for redaction of interview of the defendant.

9 THE COURT: All right. Okay.

10 MS. WALTER: The State, prior to even getting
11 this, had already redacted the last portion of the
12 defendant's interview where he talks about his other
13 pending charge. I actually cut it off. At some point
14 I believe he says if we're going to keep going, I'll
15 want my attorney, and then he talks about other
16 charges, so I cut it off right there.

17 THE COURT: When he said he would like to have
18 his attorney?

19 MS. WALTER: And anything about his charges. I
20 did give Mr. Long a copy of that redactment statement,
21 and, Your Honor, we will be playing it during the
22 Jackson v. Denno.

23 THE COURT: That was going to be my question.
24 That is the interview subject of the Jackson v. Denno
25 hearing then?

1 MS. WALTER: Correct.

2 THE COURT: For my purposes, how long is that,
3 approximately?

4 MS. WALTER: 15 minutes or so.

5 MR. LONG: At most.

6 THE COURT: Okay. Obviously, we'll make a
7 decision regarding admissibility of the statement
8 through the Jackson v. Denno hearing. Mr. Long, as to
9 the actual redaction itself, do you have issues with
10 the redaction of the statement as presented by the
11 State?

12 MR. LONG: No, Your Honor. When I was listening
13 to it, the redacted part on the DVD was just as I
14 requested. There may be 15, 20 seconds before it cuts
15 off, and then the appropriate remarks by the police
16 officer, but I think during the Jackson v. Denno we
17 can go back and listen to it.

18 THE COURT: All right. So, I mean, for some
19 reason, if we need to stop it 30 seconds earlier,
20 certainly that can be accomplished?

21 MS. WALTER: Or make a new copy if Your Honor
22 determines this afternoon we can.

23 THE COURT: Very good. Okay.

24 MS. WALTER: There is a motion to sequester
25 witnesses, and I had agreed -- Your Honor, the one

1 amendment I would make is that there are, in essence,
2 two investigators assigned, Detective Hugh Jones was
3 the original case agent, and when I began to prepare
4 for trial, I was also assigned -- or the case was
5 assigned with Detective Whitmire, Tiffany Whitmire.

6 THE COURT: Thank you, ma'am.

7 MS. WALTER: I would just ask that both
8 detectives be allowed to remain in the courtroom.
9 Detective Whitmire, at this point, I don't have her
10 scheduled to testify, but I would like both of them to
11 remain in the courtroom to assist the State with its
12 prosecution.

13 THE COURT: Any problem with that, Mr. Long?

14 MR. LONG: No, Your Honor.

15 THE COURT: Very good. Other than that, the
16 Court would have it as mutually that the other
17 witnesses, as well as any potential witnesses,
18 obviously excluding the defendant, would be
19 sequestered then. All right.

20 MS. WALTER: And then one thing, Your Honor, that
21 I wanted to put on the record. The rest of the
22 motions, I believe, will be a little bit more
23 involved. Defense filed a motion to compel evidence.
24 He requested three items. Number one was the NCIC
25 report on the victim. I discussed that with Mr. Long,

1 and we agreed it was irrelevant given that the victim
2 is not going to be testifying.

3 THE COURT: Is that correct?

4 MR. LONG: Yes, Your Honor.

5 THE COURT: Very good.

6 MS. WALTER: Photo -- number two is photo line-up
7 copies. There was no photo line-up in this case. The
8 only thing I could think of -- and I did discuss this
9 with Mr. Long -- is that when Detective Allen,
10 A-L-L-E-N, spoke with a bartender at Jimmagan's, Chad
11 Morenus, M-O-R-E-N-U-S, in an attempt to determine
12 whether the victim and defendant had been at the bar,
13 she showed photos taken from the Myrtle Beach
14 Police -- sorry, it would have been the defendant's
15 mug shot from that arrest, and then a photo of the
16 victim. She showed those to the bartender. I have
17 copies of them, but it was not a photo line-up in the
18 traditional sense. Nothing was signed or placed in
19 evidence.

20 THE COURT: So this is a potential witness that
21 the State intends to call, a bartender?

22 MS. WALTER: That's correct.

23 THE COURT: And the purpose of that testimony is
24 to say that they were there at a certain time in the
25 bar drinking?

1 MS. WALTER: Yes, Your Honor. The bar bartender,
2 in essence, will testify that the victim and the
3 defendant were at the bar close to closing time, is
4 about as accurate as he can get, and that they did a
5 number of shots in quick succession. Detective Allen,
6 I believe, tried to interview him one day. He didn't
7 have a memory of it at that point. He thought about
8 it some more, and the liquor they had been drinking is
9 what jogged his memory, and he called Detective Allen
10 back, and Detective Allen showed him the photos which,
11 for trial purposes, would be marked Exhibit 36 and 37.
12 Did you need to see these?

13 THE COURT: Let me ask Mr. Long, are those the
14 photos you are talking about regarding the motion?

15 MR. LONG: I've never been given those, never
16 been offered -- I did not know they existed until 30
17 seconds ago.

18 MS. WALTER: That is not true, because I
19 discussed this with Mr. Long in the same discussion --

20 THE COURT: I appreciate -- hold on a second. I
21 appreciate that. It may or may not have come up in a
22 discussion, but that is not what is required.

23 Mr. Long, did you serve upon the State Rule 5
24 discovery requests?

25 MR. LONG: Yes, sir.

1 THE COURT: Solicitor, in response to the Rule 5
2 discovery request, did you send to the defense copies
3 of those photos?

4 MS. WALTER: No, Your Honor. I spoke to Mr. Long
5 and said I would make them available to show them to
6 him.

7 MR. LONG: I don't remember that.

8 THE COURT: Be that as it may, the requirements
9 of Rule 5 would dictate that if the State intends to
10 use evidence in the prosecution of the case, that that
11 evidence be turned over to the defense, or as best,
12 you know -- it has to be copies. You know, if it is
13 the -- the originals don't have to be turned over, but
14 representative facsimiles, copies of the documents
15 and/or photographs or recordings must be turned over
16 to the defendants. If that actually has not been done
17 as we speak, then I'm not going to allow the State to
18 use that in the prosecution of this case as a
19 violation of Rule 5. Thank you.

20 MS. WALTER: May I ask for clarification?

21 THE COURT: Yes, ma'am.

22 MS. WALTER: Will Detective Allen and Mr. Morenus
23 be permitted to testify -- so, for instance, Detective
24 Allen would testify that she showed a picture of the
25 defendant and a picture of the victim to Mr. Morenus,

1 without admitting the photographs?

2 THE COURT: Well, the problem is then that we
3 have.....

4 MS. WALTER: I don't mean to interrupt, but that
5 portion has been summarized in Detective Allen's
6 report, which defense has had for several years now.

7 THE COURT: Well, the fact that -- all right.
8 Mr. Long, I'll hear from you.

9 MR. LONG: May it please the Court. Your Honor,
10 I would -- nowhere in the reports or discovery did it
11 ever mention that Chad Morenus, the bartender,
12 identified the defendant and the victim due to
13 pictures that were shown to him and then he gave a
14 subsequent report due to the fact he identified the
15 defendant and victim from a picture. So because I
16 never had those pictures and was not aware that that
17 was a process, that his statement was elicited, then I
18 object to Mr. Morenus testifying at trial.

19 THE COURT: That was as a result of being shown
20 photographs, but let me understand -- and it may not
21 be -- but in the information provided to you, either
22 through that witness' statement or the detective's
23 report that this particular witness identified the
24 defendant and victim as patrons in the bar?

25 MR. LONG: Yes, sir.

1 THE COURT: So, certainly, the detective would be
2 able to say as a result of -- and the bartender would
3 be able -- the detective would be able to say he
4 interviewed him and discussed it and the witness
5 identified the two. The witness will be able to say,
6 I identified to the police the defendant and the
7 alleged victim in this matter as patrons in the bar,
8 and this is what they did when they came in the bar.
9 They came in here and ordered this kind of drink and
10 they drank it. But since we're not going to talk
11 about being shown photographs or as a result of being
12 shown photographs, just that the interview occurred,
13 he identified them, identified the defendant,
14 identified the victim as patrons of the bar, did
15 whatever it is that they came in the bar and did.

16 MS. WALTER: Just so that I'm clear, Your Honor,
17 they can testify to the actual identification, but not
18 mention --

19 THE COURT: Because you have not notified them of
20 such, you can do that, but the detective cannot say,
21 Here is these photographs and that is how they did it.
22 Mr. Long, if you ask how did you know that it was the
23 defendant, it was the defendant and the victim, if you
24 ask that question, you will get the answer; you
25 understand that?

1 MR. LONG: Yes, sir. Yes, sir.

2 MS. WALTER: The third item on the motion to
3 compel was 911 tapes. There was one 911 call that was
4 disclosed to the defense.

5 THE COURT: Very good. So that takes care of
6 that particular motion?

7 MR. LONG: Yes, sir, Your Honor.

8 THE COURT: All right.

9 MS. WALTER: The remaining, Your Honor, by the
10 State's count, there are -- there should be five
11 motions left.

12 THE COURT: Which ones -- obviously, Jackson v.
13 Denno and whatever motion --

14 MS. WALTER: Sorry, that is seven motions left.
15 Jackson v. Denno requires the live testimony.

16 THE COURT: What other one?

17 MS. WALTER: The motion to suppress that was
18 filed Friday night or Saturday.

19 MR. LONG: Suppress DNA, Your Honor.

20 THE COURT: Okay. Motion to suppress DNA.

21 MS. WALTER: That requires live testimony. There
22 are....

23 THE COURT: You will be prepared to go forward
24 with those this afternoon?

25 MS. WALTER: Yes, Your Honor. There are five

1 others that would not require live testimony. Motion
2 in limine, limit the scope of cross-examination of the
3 defendant, motion in limine exclusion of the testimony
4 of Justin Stephenson, motion in limine exclude
5 evidence of bite marks and scratches on the defendant,
6 motion in limine exclusion of sexual assault
7 examination results. The State filed a motion in
8 limine seeking introduction of portions of the
9 body-worn camera footage.

10 THE COURT: Very good. Why don't we argue the
11 motion regarding the motion in limine that covers the
12 scope of cross-examination of the defendant. I'm
13 assuming this is about the in-car video, correct?

14 MR. LONG: Yes, sir, Your Honor.

15 THE COURT: Mr. Long, I'll hear from you.

16 MR. LONG: May it please the Court. Your Honor,
17 as I mentioned in my motion in limine, from the
18 beginning of the case, the case relied on in-car video
19 of the defendant to prosecute this case. As the Court
20 may understand, the dash-cam video was installed in
21 the defendant's video from a prior 2014 CSC first
22 arrest. A condition of the bond was that they put the
23 dash-cam video in the vehicle. It has been relied
24 upon by the State prior to Ms. Walter becoming
25 involved in this case, the Solicitor's Office has

1 continuously relied on this video, and now it is my
2 understanding they do not intend to introduce the
3 video into evidence because of proper foundation could
4 not be laid because the victim is deceased. I had
5 said that I would allow -- that I would stipulate that
6 the video come in, and the Solicitor's Office declined
7 that stipulation. I do believe that this is the --
8 the video is direct evidence, frankly, about the only
9 direct evidence that we have towards the attempted CSC
10 charge, and that it is very probative in its nature.
11 It is not prejudicial to the State in any way, but for
12 me to lay the foundation, the State has put me in a
13 position that almost would require the defendant to
14 take the stand in order to introduce this direct,
15 extremely relevant video that was a recording of the
16 interaction between the defendant and the victim, and
17 so, therefore, it puts the defendant in a position
18 that he is compelled to take the stand just so that
19 the jury can see this direct and very relevant
20 evidence. I believe that if the defendant is put in a
21 situation by the State that requires him to be able to
22 present this evidence, that they have intended --
23 Solicitor Walter does not know this, but the previous
24 prosecutor that was assigned to this case had
25 continuously told me that they intended to show this

1 video, and they relied on this video. So now that
2 they are putting the defendant in a position to
3 testify just so that the jury can see this relevant,
4 direct evidence, I would ask that if he does decide to
5 take the stand, it would only be for purposes of
6 laying a foundation for this video and, therefore, ask
7 that the State be limited to their cross-examination
8 as to only laying the foundation for the video.

9 THE COURT: All right. Solicitor, I'll -- I'm
10 glad to hear from you, and want to hear from you, but
11 I will tell you that previous contact the Court had
12 with this matter regarding the elements of his bond,
13 it was always presented to the Court from the State
14 that this was evidence that the State had and the
15 State intended to use this evidence at the defendant's
16 trial. Those were assertions that were made to the
17 Court when I had bond hearings in this particular
18 matter. So I'll give you that information.

19 MS. WALTER: Thank you, Your Honor. It may have
20 been that any of the number of prosecutors that had
21 this thought it was crucial to the case; however,
22 Ms. Andrew and I are the ones that are presenting this
23 case, and neither one of us believes it is crucial to
24 our case. It is our decision not to admit it in the
25 case in chief. And as a matter of fact, one of my

1 first conversations with Mr. Long about this matter
2 months ago when I told him that we would be setting a
3 trial date, because I believe there was a motion for a
4 speedy trial outstanding, I said, We are going to set
5 the trial, and he said, Well, you can't use that
6 video, and I said, That's fine. I don't need to use
7 the video. So this is not something that is a
8 surprise. That is something from my first contact
9 with Mr. Long I told him I wouldn't use the video.

10 For the legal aspect, I'll turn to Ms. Andrew who
11 authored our response.

12 MR. LONG: Can I respond?

13 THE COURT: Just in a second, I want to hear from
14 her.

15 MS. ANDREW: As Ms. Walter said, the State is not
16 relying on that video. We feel we can prove the case
17 against Mr. Dhimo without the video; however, if he
18 does choose to take the stand, which the State admits
19 is completely his decision, we do not feel that the
20 cross-examination should be limited to merely laying
21 the foundation for that video. South Carolina case
22 law indicated that any time a defendant takes the
23 stand, on their own behalf, the offer of that
24 testimony, upon any fact, is not only a waiver as to
25 all other relevant facts, but extends to facts that

1 affect credibility.

2 So our first argument is that if he does take the
3 stand, our cross-examination should not be limited and
4 we should be able to ask him any question that we see
5 fit as to relevant facts affecting the case. We think
6 that places justice and a fair trial, and the State is
7 entitled to a fair trial just as the defendant is.

8 Also, if he does get on the stand and lay the
9 foundation for the video, a necessary part of that
10 inquiry are the facts and circumstances surrounding
11 the making of the video, not only the events depicted
12 on the video, but why he had it in his car, which was
13 a condition of bond for a then CSC charge. We think
14 that all of those things would be relevant if the
15 defendant takes the stand, and we should cross-examine
16 him on all of these issues. That is all from the
17 State.

18 THE COURT: All right. Thank you. Mr. Long?

19 MR. LONG: She says they are interested in
20 justice. The video is a direct and relevant evidence
21 of the incident in question. How many times have we
22 said if we could be a fly on the wall to see what
23 happened. This video is the fly on the wall. We can
24 see it. We didn't have to rely on any motion. We can
25 see it with our eyes. Justice requires, demands, that

1 the video be seen by the jury, and the reason that the
2 camera was installed into the car is of no value to
3 the jury. It would be significantly prejudicial to
4 the defendant if the State were allowed to explain to
5 the jury or ask the defendant, or any other witness
6 that may talk about the video, why the video was put
7 in. It has no value to it. As a matter of fact, it
8 would be alluding to other crimes and bad acts and
9 would be inadmissible under 404(b). So, therefore, I
10 think it would -- one, the video is direct and
11 relevant evidence. Two, the reason why the video was
12 installed into the vehicle is not allowed under the
13 rules of evidence.

14 THE COURT: First, I'm not going to require the
15 State to produce or to use the dash-cam video in the
16 presentation of its case. Now, its existence,
17 certainly it would seem, to me, a relevant question
18 regarding any case agent, that would be either one of
19 the two that the State has in this matter, would be
20 whether or not the State is in possession of a video
21 that depicts all of the events that occurred. I think
22 that is a relevant question and the defense would be
23 allowed to ask the detectives if it exists. Just,
24 again, assuming in this particular matter the
25 defendant did not testify, the State would not be able

1 to argue that the defendant had an opportunity to
2 present that, because that is going against the Fifth
3 Amendment in requiring the defendant to, in fact,
4 defend himself. Mr. Long would be able to argue to
5 the jury that the State had evidence and chose not to
6 present it to the jury, and the jury can take from
7 that whatever they choose to take from it. He's not
8 allowed to argue further, but certainly he could make
9 that fact.

10 If the detectives testify, those being the case
11 agents, they know it exists, they would have to affirm
12 that it does exist, and the State has not played it,
13 Mr. Long can certainly bring that point to the jury in
14 his closing argument.

15 As to if the defendant does testify and sets
16 forth the parameters to put the dash-cam video in
17 evidence, I would allow the State to ask a question as
18 to whether or not he was required to have that
19 equipment in his cab. If he denies that he was
20 required, basically forced to have that equipment in
21 his cab, then the State would be able to go into the
22 circumstances, but I would not allow the State to
23 examine the circumstances, because then you would
24 start trying the defendant for another crime, and that
25 is not what that jury is there to do. They are not to

1 consider matters for which he has not yet been
2 convicted. Whether or not it has been dismissed or
3 pending does not matter. It is not a conviction,
4 therefore, defendant cannot be asked about it, but the
5 State would be able to, in some fashion, have the
6 defendant, if he testifies, admit that he was
7 required, in essence, forced, to have that in his cab,
8 but I'm not going to further limit the examination.

9 If there is other areas, if the defendant takes
10 the stand, he is opened to any and all questions about
11 any relevant matters. I'm just limiting that
12 particular issue in that fashion, but if the defendant
13 decides to testify, he is open to questions about any
14 and all relevant matters in this particular case, all
15 right.

16 MS. WALTER: There was one other -- I apologize.

17 THE COURT: That's okay.

18 MS. WALTER: That I believe there was some
19 agreement on. Defense's motion in limine, exclusion
20 of any reference that the death of a victim is related
21 to this case.

22 THE COURT: Certainly, you will have to explain
23 that in some fashion, you know, that she's not here.
24 The State would be allowed to say -- as I understand
25 it, and correct me if I'm wrong, it is as a result of

1 an unrelated drug overdose and not anything that came
2 about as a result of this case?

3 MS. WALTER: Well, I cannot legally tie the
4 victim's death to the events of this case. That is a
5 matter I'll leave for sentencing, but for the evidence
6 that would come out at trial, it will simply be that
7 Ms. Kessler died of a drug overdose approximately
8 four-and-a-half months after.

9 THE COURT: And I certainly don't have a problem
10 with that. I think it is proper to explain to the
11 jury why the alleged victim is not present so that
12 they don't speculate unduly. There is a reason why
13 she's not here, and I think the jury, to properly
14 evaluate the case, has a right to know the unfortunate
15 circumstances that prevent her from being here. I
16 certainly don't have a problem with -- I think you
17 indicated at some point in time, and this might come
18 up -- is Justin Stephenson the boyfriend?

19 MS. WALTER: Yes, Your Honor.

20 THE COURT: So I don't have a problem with the
21 State and defense, either one of you, in opening
22 saying why she's not here, assuming that there will be
23 some testimony later that would back up that
24 assertion.

25 Justin Stephenson, there was a motion in limine.

1 As I read the motion, you wanted to exclude his
2 testimony in its entirety, Mr. Long?

3 MR. LONG: Yes, sir, Your Honor.

4 THE COURT: Let me hear from you.

5 MR. LONG: May it please the Court. He was not a
6 witness to anything that occurred that night. He can
7 testify as to what happened up to the point that Ms.
8 Kessler got out of his vehicle, but that is the only
9 thing that he, himself, witnessed that night. If he's
10 allowed to testify as to the victim's mannerisms
11 before or after the incident or anything that would
12 allude to the fact, you know, that this event actually
13 did occur and affected her, I think it would be -- his
14 testimony would be used to decide the ultimate fact
15 left up to the jury and would be hearsay and
16 irrelevant for the purposes of this trial.

17 THE COURT: What is the response of the State?

18 MS. ANDREW: Your Honor, we do expect her
19 boyfriend to testify as to her behavior before and
20 after the incident occurred. We think that is
21 relevant. We also are asking him to base that on his
22 own observations, how did she look and before and
23 after, was there a change in her demeanor, any
24 inference that can be drawn from that testimony will
25 be the jury's -- it is up to them. He's not going to

1 say that the rape -- or alleged rape caused her to
2 change, he's just going to say that she changed, the
3 change he observed. He also will testify that he saw
4 her following the rape at the hospital.

5 THE COURT: Okay. I would allow Mr. Stephenson
6 to testify as to what occurred prior to Ms. Kessler
7 leaving his presence. As I understand, and I'm going
8 from the motion, so I obviously haven't heard the
9 testimony, but apparently they had been drinking, they
10 had a fight and that is how they became separated,
11 however that occurred. He can testify as to how she
12 was acting, upset or however it was that she was
13 acting at that point in time. I will allow him to
14 testify as to the next time he saw her, what he
15 observed. Again, not what she told him, not what she
16 indicated to him, not that he believes her in any
17 fashion. He will be limited to what he observed, what
18 took place in his presence, how she acted. If she was
19 visibly -- you know, if she was shaking or crying or
20 was mad or happy, or whatever she physically displayed
21 to him, he'll be allowed to testify to that. If he
22 went to -- and if he saw her at the hospital, I would
23 allow him to say he went to the hospital and he
24 observed her and this is what he saw, not why she was
25 there, what she relayed to him, not his belief in her

1 as to what may or may not have occurred. Again, he
2 can certainly testify as to what took place in his
3 presence. This is what happened in front of me, and
4 this is what I saw, this is what I heard. I'll allow
5 him to so testify. So somewhere in there, in the -- I
6 would assume in the initial stages of the testimony
7 you would be able to get out the fact of the
8 unfortunate circumstances of her demise.

9 MS. ANDREW: Yes, sir.

10 THE COURT: Regarding Mr. Stephenson, that is the
11 parameters of his testimony.

12 I think we'll break for lunch just so that I --
13 we have a Jackson v. Denno, motion to suppress DNA.
14 What other motions remain that we need to dispose of
15 this afternoon?

16 MS. WALTER: Motion in limine exclude evidence of
17 bite marks and scratches on the defendant, and
18 defendant's motion in limine exclusion of sexual
19 assault examination results.

20 THE COURT: Okay.

21 MS. WALTER: And there were sort of cross-
22 motions. The State filed a motion in limine to admit
23 portions of a body-worn camera footage. Rather than a
24 response, defense filed a motion in limine exclude
25 body-worn cameras of law enforcement. So,

1 technically, I guess they are two separate motions,
2 but same issue.

3 THE COURT: Very good. Any others besides the
4 motion to suppress DNA and Jackson v. Denno and what
5 you just talked about?

6 MS. WALTER: I believe that is it with what I
7 just told Your Honor. That should be it.

8 THE COURT: Okay. Let's come back at 2 o'clock.
9 We'll go through all of these motions and resolve them
10 this afternoon.

11 MR. LONG: I think the results of the sexual
12 examination, I think that is dealt with.

13 MS. WALTER: No, it hasn't been.

14 THE COURT: We'll cover that this afternoon,
15 okay. Thank you very much.

16 (A lunch recess was taken.)

17 THE COURT: State ready?

18 MS. WALTER: Yes, Your Honor.

19 THE COURT: We'll start with the Jackson v.
20 Denno.

21 MS. WALTER: Certainly.

22 THE COURT: You may proceed.

23 MS. WALTER: State calls Detective swear square.
24

25 (CAROL ALLEN, having been duly sworn,

1 testified as follows:)

2 MS. WALTER: Just as an administrative matter, I
3 have prepared and marked both the un-redacted copy of
4 the defendant's statement, and then the redacted
5 version, which is what we would intend to introduce.
6 I was planning, for this hearing, just using the
7 redacted copy, just so everyone is clear what
8 redactions have been made.

9 THE COURT: That would be probably the best. Go
10 ahead. You may continue.

11 MS. WALTER: Thank you.

12 DIRECT-EXAMINATION

13 BY MS. WALTER:

14 Q Where do you work?

15 A Myrtle Beach Police Department.

16 Q Were you working there in June of 2015?

17 A Yes, I was.

18 Q What was your position at that time?

19 A I was detective.

20 Q Did you assist in the investigation of criminal
21 sexual conduct against the defendant Alqi Dhimo?

22 A I did.

23 Q Did you, as part of that assistance, take a
24 statement from the defendant?

25 A I did.

1 Q Do you recall when you spoke with the defendant?

2 A I do.

3 Q What time did you speak with the defendant?

4 A I want to say around 3:30 in the morning.

5 Q And he was arrested sometime before 3:00?

6 A Yes.

7 Q When you spoke with him, had he already been
8 charged?

9 A Yes.

10 Q Was he in custody?

11 A Yes, he was.

12 Q Where was -- where did this interview take place?

13 A In one of the interview rooms in the jail area.

14 Q So the defendant was held at the Myrtle Beach
15 jail?

16 A Yes, ma'am.

17 Q Prior to talking to the defendant, did you at
18 some point shortly thereafter advise him of his Miranda
19 rights?

20 A I did.

21 Q At any time during your interaction with the
22 defendant, did you threaten him in any way to convince
23 him to make a statement?

24 A No, I did not.

25 Q Did you somehow compel him to make a statement?

1 A I did not.

2 Q Did you make any promises to entice him to make a
3 statement?

4 A No, I did not.

5 Q Was that statement recorded?

6 A Yes, ma'am.

7 Q When you spoke with the defendant, did you notice
8 any smell of alcohol on him?

9 A No, I did not.

10 Q When you were speaking with him, were the
11 questions -- excuse me. Were the answers he was giving
12 to your questions responsive?

13 A Yes.

14 Q Did it seem as though he understood what you were
15 asking and saying?

16 A Yes. Each one of the questions on that we ask
17 before we question anyone if you would have a question,
18 you know to ask me to repeat myself, and he answered,
19 yes.

20 Q When you interviewed the defendant, describe the
21 area where this took place.

22 A It was in a room, a small room. It is --
23 normally the room that we would use for blood alcohol
24 testing. We don't have an interview, so to speak, in
25 the jail area, but that is the room we were in. So a

1 desk, two chairs, video equipment, stuff like that.

2 Q Was there anyone else in the room besides you and
3 the defendant?

4 A No, just us.

5 Q Was the defendant handcuffed at the time?

6 A No.

7 Q Did you have your firearm on?

8 A No, I did not.

9 MS. WALTER: If I may approach.

10 (Ms. Walter confers with Mr. Long.)

11 MR. LONG: That's fine.

12 MS. WALTER: I'm approaching, Your Honor, with
13 what has been marked Exhibit 2 and 3.

14 Q (MS. WALTER) Was a copy of the defendant's
15 interview made and turned over to the Solicitor's
16 Office as part of discovery?

17 A Yes.

18 Q And you had a chance to review it?

19 A I did.

20 Q It is a fair and accurate representation or
21 recording of the interview with the defendant?

22 A Yes, it is.

23 MS. WALTER: I ask that Exhibits 2 and 3 be
24 admitted, but just play Exhibit 3.

25 THE COURT: Any objection?

1 MR. LONG: No, Your Honor.

2 THE COURT: To be clear, what is 2 and 3?

3 MS. WALTER: Absolutely. Exhibit 2 is the
4 un-redacted a recording of the defendant's interview.
5 Exhibit 3 is the redacted version where we took out
6 when he requested an attorney and spoke of other
7 pending is charges.

8 (State's Exhibit 2 and 3 admitted.)

9 (Video is played.)

10 Q (MS. WALTER) Detective, other than the fact we
11 cut off the end of the interview where the defendant
12 talks about an attorney and other charges, is that the
13 substance of the interview?

14 A Yes, ma'am.

15 Q You can hear a woman screaming in the background
16 during several points of that interview, who is that?

17 A I can't be sure because I was behind a closed
18 door.

19 THE COURT: If she doesn't know, I don't need the
20 answer. Thank you. She can't testify to that.

21 Q (MS. WALTER) I'll approach with what is marked
22 as Exhibit No. 1. If you can open that for us. Do
23 you recognize what was marked as Exhibit 1?

24 A I do.

25 Q What is that?

1 A Miranda form, the form I used when I read the
2 Miranda rights to Alqi.

3 Q Did he sign that?

4 A Yes, ma'am, he did as did I, date and time.

5 Q This was at some point placed into evidence?

6 A Yes.

7 MS. WALTER: I ask that Exhibit 1 be admitted.

8 THE COURT: Any objection.

9 MR. LONG: No objection.

10 (State's Exhibit 1 admitted.)

11 MS. WALTER: We rest on the hearing.

12 THE COURT: Cross-examination?

13 CROSS-EXAMINATION

14 BY MR. LONG:

15 Q You heard the video. What is Alqi's address that
16 he said on the video? Don't look at your notes.

17 A Just what I wrote down?

18 Q No, what you heard on the video. What is his
19 address?

20 A Just what I wrote down.

21 Q No. You just listened to the video. Repeat what
22 his address was?

23 A I can't.

24 Q You can't understand it, right?

25 A Well....

1 Q Do you want me to play it for you?

2 A If you would like.

3 MS. WALTER: I ask that the witness actually be
4 allowed to answer the question.

5 THE COURT: Let's cover the rules now. Attorney
6 asks a question, witness answers the question. If it
7 requires a yes or no, you give yes or no, then explain
8 the answer. Both of you will give the other courtesy
9 to either ask the question in full, or answer in full.

10 MR. LONG: I apologize.

11 THE COURT: It's all right.

12 MS. WALTER: I would also ask what -- if this is
13 the Jackson v. Denno hearing, I'm not sure what his
14 address has to do with the voluntariness of the
15 statement.

16 THE COURT: It has to do with whether or not he
17 understands, and whether or not she understands his
18 answers, and that partially answers whether it is
19 voluntary or not. I appreciate your arguments, ma'am.
20 I'll allow him to play it. Thank you. Let's
21 continue.

22 (Video is played.)

23 Q (MR. LONG) What did he say?

24 A [REDACTED] 37th.

25 Q He told you that his primary language was

1 Albanian, correct?

2 A I don't recall. Well, yes, he did say that, but
3 we -- I asked if he understood English, if he
4 understood everything that was going on.

5 Q He said his primary language is Albanian?

6 A That's correct.

7 Q And you had difficulty understanding his level of
8 education, correct?

9 A Sure.

10 Q You had difficulty understanding his answers to
11 your questions?

12 A I made sure we were understanding each other.

13 Q You understood everything he said?

14 A If I didn't, I would repeat my question.

15 MR. LONG: Could we play it, please?

16 (Video is played.)

17 Q (MR. LONG) What did he say right there?

18 A Which part?

19 Q The last sentence.

20 A Play it again.

21 (Video is played.)

22 Q (MR. LONG) That, what did he say?

23 A He said something to the effect that I can't
24 believe that, who said that?

25 Q Not something to the effect, I need to know the

1 exact words. It is very important. It is a
2 defendant's statement in a trial, very important of the
3 exact words. What did he say exactly?

4 A I cannot give you the exact words.

5 Q That was an ongoing problem throughout the whole
6 interview, correct?

7 A It was a problem, but at those points I made sure
8 we understood each other. Any questions I asked him, I
9 made sure he understood me, and then we would move on.
10 Now, the quality of this tape right here is a little
11 bit worse than what I was actually hearing during the
12 interview.

13 Q The jury doesn't have the opportunity to be in
14 the room with you, do they?

15 A No.

16 Q They have to rely on this recording?

17 A Correct.

18 Q So it was very important as a detective -- you
19 know it is important for the jury to understand
20 completely the evidence?

21 A Correct.

22 Q You did not get a transcript of this interview?

23 A No.

24 Q Is it safe to say there was several minutes that
25 you don't have a clue what Alqi Dhimo was saying?

1 A I couldn't tell you now.

2 Q And the few things that are understandable in
3 that video, is what you are saying, correct?

4 A Yes.

5 Q And you asked leading questions, correct?

6 A Yes.

7 Q And you said that you were taking the victim to
8 the hospital, correct?

9 A Not me, personally.

10 Q That is not what you said.

11 A I didn't tell him I was taking the victim to the
12 hospital, personally, myself.

13 MR. LONG: Can you go to about -- it is about 13
14 minutes into it.

15 (Video is played.)

16 Q (MR. LONG) What did he say right there?

17 A I don't know.

18 MR. LONG: Play, please.

19 (Video is played.)

20 Q (MR. LONG) That was a question he had for you.
21 What is his question to you?

22 A I can't tell you by listening to that.

23 MR. LONG: That's all I have.

24 THE COURT: Any redirect?

25

1 REDIRECT-EXAMINATION

2 BY MS. WALTER:

3 Q Detective Allen, you were sitting in the room
4 with the defendant, correct?

5 A Yes.

6 Q Right across from him?

7 A Yes.

8 Q And any time that you didn't understand, were you
9 able to clarify it at the time?

10 A Yes.

11 Q Was the sound quality of that face-to-face
12 conversation better than this audio?

13 A Yes, it was.

14 MS. WALTER: Nothing further.

15 THE COURT: You may step down.

16 Further witnesses from the State regarding
17 Jackson V. Denno?

18 MS. WALTER: No, Your Honor.

19 THE COURT: Witnesses from the defense.

20 MR. LONG: No, Your Honor.

21 THE COURT: Very good. Regarding this particular
22 statement of the defendant, obviously it is the
23 Court's determination that the defendant was in
24 custody, he was detained and Miranda warnings were
25 required in this particular circumstance. I find that

1 based upon Exhibit 1 and Exhibit 3, that the defendant
2 was advised of his Miranda warnings. There is
3 sufficient information before the Court to determine
4 that the defendant understood his Miranda warnings,
5 that he full voluntarily waived them to give the
6 statement to the police, to the extent that he gave a
7 statement, whether or not the jury will be able to
8 understand the contents of the statement, that's
9 debatable, but certainly the parts that are clear
10 regarding the Miranda warnings, I do find that is
11 clear. It is clear that the defendant knew his
12 rights, voluntarily waived them and gave statements
13 such as it is to the police. Obviously, the -- my
14 standard is preponderance of the evidence. Obviously,
15 the State must prove it beyond a reasonable doubt at
16 the trial for the jury, but based upon preponderance
17 of the evidence standard, I'm going to allow the
18 statement such as this to be played as evidence in
19 this particular matter.

20 All right. We had a motion to express DNA,
21 Exhibit 2. You need to give that to the court
22 reporter.

23 Madam Court Reporter, do you have Exhibit 1?

24 COURT REPORTER: I sure do, yes, sir.

25 THE COURT: So motion to suppress the DNA

1 evidence. Your motion, Mr. Long.

2 MR. LONG: Yes, sir, Your Honor.

3 THE COURT: I'll hear from you.

4 MR. LONG: The DNA was recovered from the
5 defendant based on a search warrant that was obtained
6 by Investigator Hugh Jones on June 22, 2015. The
7 basis or the probable cause for the finding of the
8 judge was based on Investigator Jones' sworn affidavit
9 as it appears in the search warrant. That affidavit
10 contains false statements that were known to be false
11 at the time they were written by Investigator Jones
12 and, therefore, would make a motion to suppress the
13 DNA evidence all evidence that was obtained and
14 requested through the description of the properties
15 sought in the affidavit.

16 My motion to suppress specifically the false
17 statements, one, that the victim was not found without
18 bathing suit bottoms. The detective knew at the time
19 that that was not accurate. The defendant was not
20 found standing over the victim, that is a false
21 statement. The investigation did not reveal that the
22 defendant removed the victim's pants. The victim was
23 known not to be wearing any pants at the incident site
24 and, therefore, he knew or should have known that the
25 only thing that the victim was wearing was her bathing

1 suit bottoms.

2 Finally, he said that there was proof that there
3 was attempted sexual intercourse with the defendant.
4 At the time he wrote the statement, there was
5 absolutely no proof that there was sexual intercourse
6 or attempted sexual intercourse between the victim and
7 the defendant. If not for these false statements,
8 then the search warrant would not have posed probable
9 cause for the judge to sign it, therefore, I request
10 that all the evidence that was obtained as a result of
11 the search warrant be suppressed from entering into
12 evidence.

13 THE COURT: State's response.

14 MS. WALTER: Your Honor, I will call Detective
15 Jones, but first may I ask is that considered the
16 defendant's offer of proof as to the false statements?

17 THE COURT: Mr. Long, is that your offer of
18 proof?

19 MR. LONG: No, I would like to call the detective
20 up to the stand.

21 THE COURT: Very good. Bring him around.

22 (HUGH JONES, having been duly sworn, testified
23 as follows:)

24 THE WITNESS: Hugh Jones, J-O-N-E-S.

25 DIRECT-EXAMINATION

1 BY MR. LONG:

2 Q Who are you employed by?

3 A City of Myrtle Beach.

4 Q What is the capacity that you serve there?

5 A Violent crime investigator.

6 Q How long have you been an investigator with the
7 Myrtle Beach City Police?

8 A Approximately, four years.

9 Q Two years prior to this incident?

10 A Yes, sir, I was working violent crimes.

11 Q At that night, were you assigned the case of --
12 to investigate this incident?

13 A The following day I was. This occurred in the
14 middle of the night. I came in the next day, roughly
15 7:00 a.m., and I was assigned to follow-up with the
16 case.

17 Q Did you say the next day, June 22nd?

18 A It was that day. I believe this was after
19 midnight, so the same day.

20 Q Who did you speak to about the incident?

21 A On coming in, my sergeant is Tony Allen. I think
22 he advised me to follow up on the case. The night
23 shift had received a possible criminal sexual conduct
24 and opened an investigation and asked me to follow up
25 on it.

1 Q What officer specifically did you speak to?

2 A Upon being assigned the case by Sergeant Allen, I
3 began to review the case. I read the -- basically the
4 follow-up from Detective Allen, as well as the incident
5 report, at which point I then -- along with Detective
6 Whitmire -- went and spoke to the victim at the jail.

7 Q In the incident report, is that completed by
8 Officer Eddy?

9 A Yes, sir.

10 Q Did you speak to Officer Eddy himself?

11 A No, sir.

12 Q The investigation report did not contain any
13 information about the victim's bikini bottoms being
14 off, did it?

15 A I believe Detective Allen's follow-up advised
16 that the victim's bikini -- genitalia was exposed.

17 Q But in your search warrant, that is not what you
18 said. In your search warrant, you said, Through
19 investigation, it was determined that witnesses
20 observed the victim lying face down on the beach
21 without her bathing suit bottoms, and the subject
22 standing over her with his pants and underwear pulled
23 down.

24 A Yes, sir. I was advised that the victim was
25 found without pants, which is maybe where the confusion

1 came in. She had no pants, and her bottoms were pulled
2 to the side exposing her genitalia.

3 Q Again, you said her bathing suit bottoms -- she
4 did not have them on?

5 A That is the way I understood it.

6 Q But you wrote a sworn statement giving the judge
7 probable cause for this saying that her bathing suit --
8 she was without her bathing suit bottoms, correct?

9 A Yes. I think my wording was that, but what was
10 passed on was genitalia was exposed, and I took it the
11 way it was written that it meant it was pulled down.

12 Q So it was an inaccurate statement you wrote in
13 your sworn affidavit, correct?

14 A I believe I misunderstood from the physical scene
15 to the way it was written.

16 Q Did you notify the judge of your error?

17 A I didn't know it was an error until coming into
18 trial.

19 Q Until when?

20 A Until right now, we're discussing it. The way I
21 understand it, the bathing suit was pulled down.

22 Q But you admit it was a mistake?

23 A Genitalia was exposed. She had no pants on. I
24 could have maybe worded it better, but it wasn't....

25 Q You can understand it would be misleading to a

1 judge to think that the victim's bathing suit bottoms
2 were off?

3 MS. WALTER: This is direct examination for Mr.
4 Long.

5 THE COURT: I appreciate that. I'll allow him to
6 fully explore the matter, thank you.

7 A Sorry.

8 Q (MR. LONG) You would admit that would be
9 misleading a judge -- excuse me. Strike that.

10 A judge could think that the victim did not have
11 bathing suit bottoms on in reading your affidavit,
12 correct?

13 A That is what I thought at the time.

14 Q And the victim did not wear pants on that night,
15 did she?

16 A She apparently had bathing suit bottoms on.

17 Q The first officer on the scene, he wrote in his
18 report she was found in her bathing suit bottoms?

19 A Yes, sir. He also wrote that the bottoms were
20 backwards when they saw him at the jail, which
21 indicates to me that --

22 Q Stop. That is not what I asked.

23 A Sorry.

24 Q I asked -- we're talking about her -- you said
25 she was wearing pants that night. You said that the

1 subject removed her pants?

2 A It was -- someone relayed to me that she was
3 found without pants.

4 Q No. I don't want to cut you off, I'm sorry, but
5 my question is, you said in your sworn affidavit that
6 the subject removed her pants?

7 A That is what he indicated at the time.

8 Q Who indicated that to you?

9 A That is the way I took it at the time. After
10 interviewing the victim, it was learned that she was
11 grossly intoxicated, learned that she did not consent
12 to sexual intercourse.

13 Q That is not what I'm asking you.

14 A But it was also --

15 Q I'm talking about --

16 MS. WALTER: Your Honor, I'm asking that the
17 detective be allowed to answer.

18 THE COURT: Let's be clear here. The attorney
19 asks a question. If you do not understand the
20 question, then you may ask him to repeat it. You
21 certainly are allowed to answer the question the best
22 you can, but you must respond as best you can directly
23 to the question, then you may explain it.

24 THE WITNESS: Yes, sir, Your Honor, I apologize.

25 THE COURT: Ask your question.

1 Q (MR. LONG) I'm talking in regards to
2 specifically your statement that you said that the
3 subject did remove her pants.

4 A Yes, sir.

5 Q No witness said that he removed her pants, at the
6 time of the sworn statement, did they?

7 A As far as the witnesses on beach, no; however,
8 upon interviewing the victim, she advised that she was
9 not -- she was not consenting --

10 Q Again --

11 THE COURT: I'll allow him to answer the
12 question, please, Mr. Long. Go ahead, sir.

13 A She advised that she was too impaired to consent
14 to sexual intercourse. She remembered none of the
15 events. She remembered the defendant basically
16 attacking her, at which point she advised she attacked
17 back. That, to me, was her basically stating that she
18 didn't pull her pants down for him or to the side, she
19 advised she was basically struggling during this
20 altercation.

21 Q (MR. LONG) She never told you that she was
22 wearing pants, did she?

23 A She didn't remember the entire incident but she
24 did not advise she was wearing pants.

25 Q Isn't it true that during the interview with the

1 victim that she told you she was wearing what she had
2 on at the time you talked to her?

3 A Yes, sir.

4 Q And what was she wearing at the time you talked
5 to her?

6 A I believe at the time we talked to her, they gave
7 her clothes from the jail.

8 Q What was she wearing at the time you talked to
9 her?

10 A Can't remember off the top of my head.

11 Q No witness saw the defendant standing over the
12 victim on the beach, did they?

13 A The way I understood it, reading the follow-ups,
14 was that the defendant was seen standing over the
15 victim.

16 Q Did you read the written statements of the
17 security guard who saw the defendant?

18 A I didn't have their written statements at the
19 time.

20 Q But that was given to Officer Eddy early that
21 day, correct?

22 A Yes, it was given to him that night, at which
23 point he would usually drop them into Records. They
24 are evidence, so he wouldn't physically come and hand
25 them to us, it has to go through a process.

1 Q Wouldn't you think it is important to review all
2 of the evidence before you swear an affidavit to a
3 judge for a search warrant?

4 A I reviewed Detective Eddy's report, Detective
5 Allen's report. I spoke to the victim, who advised me
6 she did not consent to any sexual activity, whatsoever.
7 I observed the defendant's photos from the -- booking
8 photo, and you can see the -- excuse me, Detective
9 Allen's report that you could clearly see injuries to
10 the defendant consisting with the victim's struggling
11 from the sexual assault.

12 Q At the time you wrote this affidavit, you did not
13 know that -- there was no evidence of sexual
14 intercourse at the time you wrote this affidavit,
15 correct?

16 A I believe there was an affidavit of -- attempted
17 sexual intercourse, yes, sir.

18 Q What is that evidence?

19 A The defendant was seen by witnesses with his
20 pants down. The way I took --

21 Q Stop. That, in and of itself, is not evidence?

22 A That was only partial --

23 MS. WALTER: The detective is not allowed to
24 finish his answer.

25 THE COURT: Mr. Long, when you ask a question,

1 please allow him to answer the question, and then you
2 can ask follow-up questions. Thank you.

3 Q (MR. LONG) At the time you wrote this affidavit,
4 there was no evidence of sexual intercourse, correct?

5 A In my opinion, there was evidence of attempted
6 sexual conduct. Witnesses saw the defendant in the
7 immediate area of the victim, the way I took it, was
8 standing over her with his pants down. The victim,
9 upon arrival of the officers, had her bottoms pulled
10 down in such a way that her privates were exposed. The
11 defendant had injuries on him consistent with the
12 victim's struggling to prevent a sexual assault. Upon
13 interview the victim --

14 Q But -- I'm sorry.

15 A Upon interviewing the victim, she advised that
16 she was too intoxicated to give any consent,
17 whatsoever, for sex. Upon interviewing the victim, she
18 advised that upon the defendant picking her up, he
19 carried her to a bar and gave her numerous drinks, and
20 then carried her to a beach.

21 Upon listening to an interview with Mr. Dhimo, he
22 picked her up in the area of 44th and carried her
23 straight to 77th, which is not consistent with what
24 actually happened. So based on all of that, and the
25 victim's reactions as we were walking through this, as

1 to what happened, that he was found in the immediate
2 area of her without -- with his pants pulled down,
3 seen by witnesses, that she had her pants to the side.
4 Her reaction to that seemed consistent with a victim
5 of a sexual assault, at which time she went to the
6 hospital for a sexual kit.

7 Based on the totality of the evidence, I felt
8 there was evidence of a sexual assault occurring.

9 Q So you used the evidence that was used during the
10 sexual assault as a basis for this affidavit?

11 A I don't believe I said that, no, sir. I said
12 upon interviewing the victim, she went for a sexual
13 assault kit.

14 Q Is that evidence in and of itself of sexual
15 intercourse?

16 A No. I described a list of things.

17 Q But you didn't put any of that in your affidavit?

18 A I put what I had at the time, yes, sir.

19 Q You said that, again, the investigation to the
20 incident did reveal that the subject did remove her
21 pants, as well as his, in an attempt to have sexual
22 intercourse with the incapacitated victim.

23 So you are saying that he did remove her pants
24 and his pants in order to have sexual intercourse?

25 A That is the way I understood it, yes, sir.

1 Q But her pants were not removed?

2 A To the side.

3 Q No. Those were bikini bottoms, not pants?

4 A Yes, sir. Okay.

5 MR. LONG: That is all I have -- I'm sorry,
6 that's all the questions.

7 THE COURT: Cross-examination?

8 MS. WALTER: May I approach the witness?

9 THE COURT: Yes, ma'am.

10 CROSS-EXAMINATION

11 BY MS. WALTER:

12 Q I'm approaching you with State's Exhibit 8; do
13 you recognize that?

14 A Yes, sir. It appears to be a search warrant
15 prepared.

16 Q That's the search warrant that we've been
17 discussing here?

18 A Yes, ma'am.

19 Q Is that a fair and accurate reproduction of that
20 search warrant?

21 A Yes, ma'am.

22 MS. WALTER: I ask that Exhibit 8 be admitted
23 into evidence.

24 THE COURT: Any objection?

25 MR. LONG: No, Your Honor.

1 (State's Exhibit 8 admitted.)

2 THE COURT: Admitted for this hearing.

3 Q (MS. WALTER) As you were gathering your
4 information for your affidavit, when you said there
5 was evidence of attempted sexual assault, tell us
6 piece by piece what it was that you learned that you
7 believed pointed to a sexual assault?

8 A Yes, ma'am. As I said, I wasn't working that
9 night. I came in the following morning. It was passed
10 onto me that a possible sexual assault may have
11 occurred. It was passed on that the defendant was
12 arrested for indecent exposure, so he was charged for
13 not having pants on in the immediate area of the
14 victim. It was also passed on that he had numerous
15 wounds or injuries on him consistent with bite marks
16 and scratches, I believe on his biceps area and
17 shoulder area. It was also relayed in Detective Eddy's
18 follow-up that upon approaching him -- or upon
19 approaching the victim, her private area was exposed.
20 Her pants were -- bikini bottoms were in such a way
21 that genitalia was exposed in a way that wouldn't be
22 natural where you just fell, is the way I took it.

23 Also, I believe they said that the sand was -- it
24 appeared that they possibly had a scene on the beach.
25 I listened to the interview of the defendant, and upon

1 doing so, he advised he picked her up at one location
2 and basically carried her straight to the beach. Upon
3 -- myself and Detective Whitmire interviewed the
4 victim, at which point she advised she was picked up
5 in a different area and carried to a bar with the
6 defendant, which does not seem like a natural thing
7 for a cab driver because he went inside and bought her
8 numerous shots.

9 After drinking numerous shots, she advised she
10 was highly impaired, wanted to go home. They ended up
11 on the beach. She remembered none of the sexual
12 assault. She remembered the defendant attacking her.
13 I don't know if that was the exact words, but it was
14 the defendant attacking her, and she attacked back
15 when being -- when he was grabbing her. In speaking
16 with her and kind of going through the incident, and
17 the defendant being arrested for indecent exposure for
18 being on top of her, and her being exposed, her
19 reaction appeared to be someone that was involved in a
20 sexual assault. She seemed nauseous. She seemed
21 disturbed and seemed -- she began crying. She got
22 visibly upset, and upon becoming sick, we stopped the
23 interview because she felt nauseous. Based on all of
24 that, I believe we had an attempted sexual assault.
25 She consented to a sexual assault kit and went to the

1 hospital.

2 Q Back up for a minute. So the defendant was found
3 on the beach by three security guards?

4 A Yes, ma'am, the way I understand it.

5 Q From a nearby hotel?

6 A Yes, ma'am.

7 Q Those three security guards saw the defendant
8 standing over the victim?

9 A Yes. And upon listening to a 911 call, the
10 complainant advised that he's standing -- the defendant
11 is standing on the beach with no pants, shirt down,
12 basically angry that someone wouldn't wake up.

13 Q In fact, one of the security guards was named
14 Benjamin Thompson.

15 A I can't remember the names off the top of my
16 head, but that sounds right.

17 MS. WALTER: May I?

18 THE COURT: Yes, ma'am.

19 MS. WALTER: I'm approaching with State's 9.

20 A I apologize. I did have his name on the record.

21 Q Doesn't Mr. Thompson say that when he first saw
22 the defendant, the defendant was laying in the sand and
23 jumps up, and it was at that point that Mr. Thompson
24 could see that he had no pants on?

25 A Yes, ma'am.

1 Q Would that also factor into an inference that
2 there was a sexual assault?

3 A Yes, ma'am, along with witnesses saying that he
4 basically told them to go away, everything is fine, go
5 away.

6 Q Did -- do you know whether Detective Eddy
7 actually saw marks and abrasions around the victim's
8 genital area?

9 A Yes, ma'am.

10 Q Yes, he did?

11 A Yes, ma'am.

12 Q And I believe you said this earlier, Detective
13 Eddy actually noticed at some point later that her
14 bikini bottoms were on backwards?

15 A Yes, ma'am. Going into jail, I believe he
16 pointed that out to Detective Allen.

17 Q Would that perhaps make you believe that her
18 bikini bottoms had been removed at some point?

19 A Yes, ma'am. That is basically where I got -- at
20 one point, they were off and then back on.

21 Q Other than the bathing suit bottom, the victim
22 did not have pants, skirt or shorts on, correct, just
23 bikini bottoms?

24 A Yes, just bikini bottoms and a very long shirt,
25 or....

1 Q Coverup?

2 A There you go.

3 Q In your affidavit, you never said that a witness
4 said that the defendant removed her pants, correct,
5 that was just an inference you were making from the
6 evidence at the time?

7 A Yes. That is the way I understood it at the
8 time, yes, ma'am.

9 Q Is it your understanding that when the officer --
10 now Detective Eddy -- he was first on the scene,
11 correct?

12 A I believe so, yes, ma'am.

13 Q When he approached, was the defendant still
14 standing over the victim, essentially?

15 A He was in the immediate area. He was very, very
16 close to her upon his arrival.

17 Q So victim was on the ground?

18 A Victim was basically unconscious. They had to
19 use smelling salts to revive her.

20 Q The defendant was standing?

21 A Yes, ma'am.

22 Q So he was distancing --

23 A Standing in the immediate vicinity of her. The
24 way I took it was he was basically standing over her.

25 MS. WALTER: Nothing further at this time. I

1 would ask that Exhibits 8 and 9, and I think we
2 admitted 8, but Exhibit 9 be admitted.

3 THE COURT: Any objection to State's 9 being a
4 part of this motion?

5 MR. LONG: None, Your Honor.

6 THE COURT: Admitted.

7 (State's Exhibit 9 admitted.)

8 THE COURT: You have further questions?

9 MR. LONG: Yes, sir.

10 THE COURT: Go ahead.

11 REDIRECT-EXAMINATION

12 BY MR. LONG:

13 Q Detective Jones, are you testifying that the
14 basis of your affidavit, which is three -- statements
15 from the three security guards?

16 A No, sir. I'm saying that the basis for my search
17 warrant is what we went over, but it was based on
18 Detective Eddy's follow-up, Detectives Allen's
19 follow-up, my interview with the defendant and
20 basically what we saw with the defendant.

21 Q I'll ask you specific questions.

22 A I'm sorry, I didn't mean --

23 Q You did not see the statements from the security
24 guards at the time that you wrote this affidavit?

25 A No, sir.

1 Q So the statements from three security guards was
2 not a basis for this affidavit?

3 A No, sir.

4 THE COURT: Let him finish answering the
5 question. Go ahead.

6 A The officer basically wrote down that "witnesses
7 state," and I went off of his statement.

8 Q When did you see the officer's statement?

9 A Next morning.

10 Q What time?

11 A I came in at 7:00, started looking at reports and
12 everything that morning. I can't give you an exact
13 time.

14 Q When did you learn that Officer Eddy's saw marks
15 and abrasions on the victim?

16 A Officer Eddy -- I didn't know about the marks and
17 abrasions at that time. I knew he found the victim
18 with her pants removed, and I think he basically
19 advised that it appeared that a sexual assault had
20 taken place.

21 Q How close did Officer Eddy say the defendant was
22 standing to the victim?

23 A I don't have the exact location.

24 Q It is a big difference from standing over someone
25 and standing ten feet away, right?

1 A Yes.

2 Q So what did he say?

3 A Can't give you an exact distance.

4 Q Did Officer Eddy tell you directly that he saw
5 the defendant standing over the victim?

6 A No, sir.

7 Q You just took that as an inference?

8 A That's the way I understood it, yes, sir.

9 Q And the removing the pants, you just told
10 Solicitor Walter that was an inference from -- the
11 evidence you obtained?

12 A Yes, sir. The victim advised she didn't remember
13 removing her pants, and she advised she was basically
14 passed out -- or that she was passed out on scene when
15 the officers arrived.

16 MR. LONG: That is all I have.

17 THE COURT: All right.

18 EXAMINATION

19 BY THE COURT:

20 Q Were there follow-up reports by the officers?

21 A Yes, sir.

22 Q Threes follow-up reports, did you read those?

23 A I read -- yes. Yes, sir. Detective Allen went
24 to the scene. She's the one that interviewed the
25 defendant, as well as talked to Detective Eddy, and,

1 yes, sir.

2 Q All right. So did you do that before you signed
3 the affidavit for the search warrant?

4 A Yes, sir. That is basically the first thing I
5 did at that point before I did the investigation.

6 Q You did not, yourself, look at the statements of
7 the security guards or the witnesses?

8 A No, sir.

9 Q What you are telling the Court is that you looked
10 at the reports, follow-up reports, of then Officer Eddy
11 and Detective Allen?

12 A Yes, sir.

13 Q You talked to the victim herself?

14 A Yes, sir, Your Honor.

15 Q What else did you do before you signed the
16 affidavit and gave it to the magistrate?

17 A That was basically the synopsis, going through
18 the reports, reviewing and listened to the defendant's
19 interview.

20 Q And you listened to the defendant's interview?

21 A Yes, sir.

22 Q And after that, you signed the affidavit and
23 presented it to the issuing magistrate for a search
24 warrant?

25 A Yes, sir. I completed the search warrant. It is

1 printed in the clerk's office. Our clerks have powers
2 to sign arrest warrants. I went up there and swore the
3 affidavit in front of them.

4 Q Of the magistrate?

5 A Yes, sir, municipal judge.

6 Q City judge?

7 A Yes, sir.

8 Q Did you orally add to or explain anything to the
9 issuing judge, city judge, before or at the time you
10 were asking for the search warrant?

11 A I don't recall off the top of my head. Usually
12 we print it out and discuss the case with them, but I
13 can't remember specifically.

14 Q You say your usual course is to do so, but in
15 this this particular instance, you can't tell me that
16 you added anything orally to what is in the written
17 affidavit?

18 A No, sir. I believe I did -- usually I explain to
19 them.

20 THE COURT: Anything on those questions?

21 MS. WALTER: No, Your Honor.

22 THE COURT: Mr. Long?

23 MR. LONG: Court's indulgence. May I ask a
24 question of the witness, Your Honor, in regards to the
25 police report, officer Eddy's?

1 THE COURT: Yes.

2 REDIRECT-EXAMINATION

3 BY MR. LONG:

4 Q Did you review Officer Eddy's written report?

5 A I believe -- I believe I read part of it. I
6 don't believe it was signed off on it, but we can
7 access the computer and read the narratives.

8 Q On Page 4 of the report, narrative, Officer Eddy
9 wrote, quote, She was wearing a white tank top and
10 either white underwear or white bathing suit bottoms.

11 At the time you read that report, you knew that
12 she was not found without bathing suit bottoms on?

13 A I don't remember reading it, no, sir. Like I
14 said, the way -- I may have misunderstood it, but I was
15 told that she didn't have pants on, which is the
16 bathing suit bottoms, and that her genitalia was
17 exposed. So her pants were pulled down, I meant her
18 genitalia was exposed.

19 MR. LONG: That's all.

20 THE COURT: Further witnesses on behalf of the
21 defense?

22 A No, Your Honor.

23 MS. WALTER: Court's indulgence.

24 (A brief pause in the proceedings.)

25 MS. WALTER: No witnesses.

1 THE COURT: Thank you. I'm going to take a few
2 minutes 20, read through State's 8 and 9, that is the
3 search warrant and attachments and the statement of
4 the witness, and then we'll come back in. Thank you
5 very much.

6 (A recess was taken.)

7 THE COURT: Solicitor, did you mark the report of
8 then Officer Eddy?

9 MS. WALTER: I did, Your Honor. It is marked as
10 State's 36. Your Honor, I also marked Detective
11 Allen's report, since Detective Jones said he referred
12 to that, and that is marked Exhibit 37, and I'm
13 apologizing for the numbers jumping around, but I
14 created my exhibit list ahead of time.

15 THE COURT: That's all right. Any objection to
16 State's 36 and 37 coming into evidence for this
17 hearing?

18 MR. LONG: No, Your Honor.

19 THE COURT: Very good.

20 (State's Exhibits 36 and 37 admitted.)

21 (A brief pause in the proceedings.)

22 THE COURT: Your arguments, Mr. Long.

23 MR. LONG: Your Honor, I believe that during the
24 hearing we have been able to determine that the
25 statements in question that were raised in the motion

1 were known not to be true at the time of the signing
2 of the affidavit. The detective, he admitted that he
3 made some inferences from the statements that were
4 made, from the reports that he looked over. He made
5 some assumptions, but the inferences and assumptions
6 and hearsay, the document that he signed made no
7 references to his sources. The affidavit, sworn
8 statement, for the basis of the probable cause, was to
9 the judge that these statements were true to the best
10 of his knowledge, and that simply is not true. I
11 mean, the evidence -- the proof or the evidence that
12 would be available -- or readily available for him to
13 verify these claims, there is no particular hurry for
14 him to get this affidavit for DNA. You know, it is
15 not going anywhere. So the detective had the time to
16 slow down, to get the true and accurate information
17 before he made a sworn statement to a judge, and
18 because he made these reckless statements or false
19 statements in a very rapid time, the judge did find
20 probable cause to give the search warrant. But for
21 these inaccurate reckless statements, the judge would
22 not -- the defense argues that the judge would not
23 have been able to find probable cause and, therefore,
24 not issue the search warrant, so that is why the
25 defense makes a motion to exclude any and all evidence

1 that was derived as a result of the search warrant.

2 Thank you.

3 THE COURT: Solicitor.

4 MS. WALTER: Your Honor, I don't think that there
5 has been any evidence that Detective Jones included
6 anything in the affidavit that he knew not to be true.
7 What he testified to is that he gathered as much
8 information as he could, as quickly as he could, and,
9 yes, he did make certain inferences from the evidence
10 that he gathered, but certainly there is nothing --
11 nothing has been brought forward where he knew any of
12 this was untrue at the time he presented it to the
13 municipal judge.

14 Furthermore, many of the statements that were
15 cited in the defendant's motion to suppress were, in
16 fact, true. The defendant was found standing over the
17 victim by three different security guards and by
18 Officer Eddy. There was proof, certainly
19 circumstantial proof, yes, but there was proof that
20 there had been an attempted sexual assault, and I
21 think that is borne out in Officer Eddy's report, that
22 the bathing suit bottoms were pushed to the side,
23 genital areas were exposed, abrasions on the genital
24 area, there were bite marks on the defendant's arm.
25 The victim stated that he attacked her, and she fought

1 back.

2 Whether or not -- there clearly was a little bit
3 of misunderstanding between "pants" and "bathing suit
4 bottoms," but it is not the death for the warrant.
5 She was wearing bathing suit bottoms and they were
6 pushed to the side to the point that Officer Eddy
7 could see her vaginal area.

8 Detective Jones did not include anything in the
9 affidavit that he knew not to be true. It may have
10 turned out that some things were not quite that he
11 believed them to be, but even if Your Honor were to
12 find that and excise just the portion about the
13 bathing suit bottoms or victim found without -- that
14 her bathing suit bottoms were off, certainly the rest
15 of the affidavit is such to establish the probable
16 cause. That is the remedy, as I'm sure Your Honor
17 knows, that if Your Honor believes that any of the
18 statements were intentionally misleading or made with
19 reckless disregard for the truth, you would excise
20 them from the affidavit, and if the affidavit as it
21 then stands establishes probable cause, then the
22 search warrant stands, and so that is what the State
23 submits to Your Honor should happen here.

24 THE COURT: Thank you.

25 As set forth originally in Franks versus

1 Delaware, there is a presumption of validity with
2 respect to the affidavit supporting the search warrant
3 regarding a challenge to it to be entitled to the
4 Frank's hearing for the defendant or person making the
5 challenge must make a preliminary showing that the
6 information in question was intentionally made or made
7 with reckless disregard as to its truth.

8 Further, there is not a Frank's violation if the
9 affidavit contains sufficient information to establish
10 the probable cause if certain -- if the offending
11 portion is omitted. The party attempting to
12 demonstrate information was intentionally or
13 recklessly placed the affidavit bears a heavy burden
14 of proof, and this action must be designed to mislead
15 or made in a reckless disregard and whether it would
16 mislead the issuing judge. The defendant must show
17 that that material was necessary to the finding of
18 probable cause such that if it was omitted, that the
19 affidavit would be insufficient to support probable
20 cause.

21 Regarding probable cause and the warrant being
22 issued on probable cause, that's as the Court has
23 defined it to be a fluid constant turning on the
24 assessment of probabilities in the particular factual
25 context, and the standards of proof beyond a

1 reasonable doubt or by a preponderance of evidence
2 have no place in the issuing judge's decision in
3 issuing a search warrant. There only needs to be --
4 it's a probability, not a prima facie showing.

5 So regarding this, looking at the affidavit and
6 the testimony of the detective, Investigator Jones,
7 that signed the affidavit before the magistrate, he
8 stated that he had spoken to the victim. He had
9 reviewed the reports of the officers -- investigating
10 officers in this particular matter, as reflected in
11 Exhibits 36 and 37. State's Exhibit 9 is a subpart of
12 the report of Exhibit 36. But in looking at that, the
13 information that the officer had was that independent
14 witnesses observed the defendant with his pants off,
15 that he did not want them coming to the scene where he
16 was located, that they knew there was an object right
17 next to him, who the independent witnesses could not
18 tell what that was, that the defendant was standing
19 next to with his pants down.

20 The first arriving officer found at that spot a
21 young female laying in the sand unconscious. He
22 stated that the female's bottom half was flat on the
23 sand with her backside facing up, her top half was on
24 her left side with her face in the sand. She was
25 wearing a white tank top and either white underwear or

1 white bathing suit bottoms. The bottoms were pulled
2 to the side exposing her private area. Sand was
3 covering the female's body, except around her mouth
4 and her private area. There were red marks close to
5 her butt and private areas.

6 The affidavit of Investigator Jones is
7 information to the issuing magistrate that on June 22,
8 2015, officers from Myrtle Beach Police Department
9 responded to the beach access within the city limits
10 of Myrtle Beach in reference to a possible CSC
11 incident. Investigation determined that a witness
12 observed a victim laying face down on a beach without
13 her bathing suit bottoms, and the subject standing
14 over her with his pants and underwear pulled down.
15 Investigation revealed that the victim was
16 incapacitated to the point she could not consent to
17 sexual intercourse. Investigation in the incident did
18 reveal that the subject did remove her pants, as well
19 as his, in attempt to have sexual intercourse with the
20 incapacitated victim. He was taken into custody.
21 They also -- the defendant had injuries on him which
22 were consistent with the victim's statements. The
23 investigator signed the affidavit. He had actually
24 talked to the alleged victim.

25 If you look at the information given to the

1 magistrate, based upon the information available to
2 the investigator, I do not find that -- it was not
3 demonstrated to the Court that any of the information
4 was intentionally or recklessly exchanged, deleted
5 purposely placed in an incorrect manner. While it is
6 clear that her underwear was not pulled down, as set
7 forth in the affidavit, actual information of her
8 underwear being pulled to the side and her private
9 areas being exposed is not such that it would change
10 the magistrate's or issuing judge's decision in any
11 way regarding an attempt or attempted CSC being that
12 the private areas were being exposed with a person
13 standing next to her with his pants down. Whether or
14 not he removed her pants does not -- if that is
15 admitted -- does not change the issuing magistrate's
16 decision in any way. The information is that she was
17 so incapacitated that she could not constant to any
18 sexual activity.

19 Since the defendant has failed in his
20 requirements under a Frank's hearing, I respectfully
21 decline to grant the defendant's request to exclude
22 any of the evidence secured as a result of the search
23 warrant, unless there are further grounds or reasons
24 to attack the -- that type of evidence, but based upon
25 the Frank's hearing, the request is denied.

1 All right. We have to decide the matter about
2 the exclusion of the sexual assault examination
3 results; is that correct?

4 MS. WALTER: Yes, that is one of the remaining
5 motions.

6 THE COURT: Mr. Long.

7 MR. LONG: What is it?

8 THE COURT: Exclusion of the sexual assault
9 results.

10 MR. LONG: I talked to Solicitor Walter about it,
11 and there may be a miscommunication, but I'm under the
12 understanding we resolved that earlier today when we
13 talked about the SLED sexual assault report, that it
14 would not be coming in due to the unavailability of
15 the victim.

16 THE COURT: What is it that the State is
17 intending to use regarding little sexual assault
18 examination kit or protocol?

19 MS. WALTER: Your Honor, the State, quite
20 honestly, was a little confused as to what
21 specifically the defense was trying to exclude, so I
22 covered it all in my written motion. I took it to
23 believe that he was trying to exclude reference to any
24 answers provided by the victim during the examination,
25 reference to the name of the sexual assault

1 examination protocol, and reference to the results of
2 the examination. I noted in my motion there was not a
3 single legal authority for that request. We have said
4 that we will not elicit any statements had by the
5 victim during the sexual assault protocol; however,
6 nurse Ms. Hennig-Ryan will testify that she spoke with
7 the victim, and she does that in part. She speaks
8 with the victim and reviews the reports to know
9 exactly what to do, what evidence to try to collect,
10 but she will not mention anything or any statements
11 made by the victim. So that kind of took care of the
12 first portion.

13 As to the defendant's request to preclude using
14 the name of "sexual assault examination protocol," it
15 seemed that he was arguing about that being unduly
16 prejudicial. The State notes the name in and of
17 itself would not be prejudicial; in fact, the
18 defendant is charged with criminal sexual conduct.
19 So, certainly, there is an allegation and inference by
20 the State that there was a sexual assault, or at least
21 an attempt for a sexual assault, so, therefore, we
22 mention a sexual assault examination protocol and it
23 is not unduly prejudicial.

24 The State also offered that if Your Honor was
25 concerned that there might be some type of prejudice

1 from that name, that certainly an instruction could be
2 given to take care of that. I focus the rest of my
3 argument on what I took to hear that the defendant was
4 trying to preclude us from even discussing the results
5 of the examination. There are several layers to that.

6 First of all, the results of the examination
7 could be that Nurse Ms. Hennig-Ryan scraped under the
8 victim's fingernails, she took vaginal swabs, oral
9 swabs. It could relate to any of the actual evidence
10 collection that she did. That kit was then sent to
11 SLED. Part of the work that was done at SLED was the
12 victim's blood -- and I think it was just her blood --
13 was submitted for a toxicological screen, which found
14 that ten-and-a-half hours after her documented last
15 drink, she was a .162 blood alcohol concentration.
16 She also had THC metabolite in her blood.

17 Additionally, with the right-hand fingernail
18 scrapes, they were submitted to DNA, and the DNA under
19 the right fingernails came back to the defendant. I
20 think it was a 1 in 67 trillion possibility that it
21 could have been someone else. So, certainly, that is
22 all probative and relevant evidence. None of it is
23 hearsay. None of it is being based on the victim's
24 statements. It is all, as I said, relevant and
25 admissible. It is prejudicial to the defendant, that

1 is the whole point of all of the State's evidence, it
2 prejudices the defendant because we're trying to
3 convict him, but it is not unduly prejudicial.

4 I think it was also -- yes, I did want to point
5 out that the defense's motion actually cited to the
6 wrong standard. It is not that the prejudice has to
7 be outweighed by the probative value, but the
8 probative value has to be substantially outweighed by
9 a danger of unfair prejudice, and that is simply not
10 the case here. It is relevant, admissible evidence
11 that is not substantially outweighed by a danger of
12 unfair prejudice.

13 THE COURT: All right. Mr. Long, as a result of
14 the motion, what are you asking the Court to exclude?

15 MR. LONG: I think it was handled earlier, Your
16 Honor, with your limited instructions for the nurse
17 person who did the sexual exam. I do not disagree
18 with what the Solicitor said, so with all of that in
19 mind, I can withdraw my motion. I think we're
20 satisfied.

21 THE COURT: Just so we're clear about this. You
22 know, I expect the nurse to be called, for her to go
23 through who she is employed by, duties and training,
24 what is expected of her, in her job, for the
25 particular hospital, and as a result of that, she saw

1 the alleged victim in this matter. As a result of her
2 examination of the victim, she got this information,
3 and go through the laundry list of things she
4 collected and that she put it together in a manner
5 prescribed by State Law Enforcement Division, and it
6 was transmitted or given to whoever she turned it over
7 to. That, then, does not go into, at any point in
8 time, an inference that she talked to the victim and
9 the victim pointed her to, you know, examine a certain
10 area which might tend to comment on the testimony of
11 the -- of the, unfortunately, deceased victim in this
12 matter.

13 So strictly stick with her duties and
14 responsibilities, she performed those, did the test,
15 collected this information, put it together in a
16 manner that it is supposed to be put together and gave
17 it to whomever was there to receive it, and then go on
18 with the chain from there, wherever it went, how it
19 got to SLED, who tested it at SLED and what the
20 results were that came down, but not any inferences or
21 comments that what she did was as a result of
22 communications with the victim. Because if we look at
23 -- and you are not intending to put the report in?

24 MS. WALTER: No, Your Honor. I don't know that
25 we would be allowed to.

1 THE COURT: That goes into that area.

2 MS. WALTER: Even if the victim is alive, I don't
3 think we're permitted to.

4 THE COURT: Very good. So with that then, body
5 camera footage is an issue. That's the State's
6 motion; is that correct?

7 MS. WALTER: This was the motion that sort of was
8 mixed, because the State had filed a motion in limine
9 to admit portions, and the defense filed a motion in
10 limine to exclude them in their entirety.

11 THE COURT: What is it that the State would like
12 to produce?

13 MS. WALTER: Your Honor, I have Exhibit 7, which
14 is -- what I did, Your Honor, was took body camera
15 video footage from three different officers and picked
16 portions. They are not duplicative, really, and I can
17 play it, but Officer Eddy was the first officer
18 responding. So, essentially, I took a portion of his
19 body camera video from when he first walked up until
20 EMTs finally removed the victim from the beach. So it
21 shows her on the ground completely unresponsive. It
22 also contains, I think, Officer Cooper and I think it
23 is Jeremy Williams who were the second and third
24 officers on the scene, and their attempts to revive
25 the victim, as well as the placement of some evidence

1 found in the sand.

2 Officer Freeman, his camera had the best attempts
3 to revive the victim, so it shows them applying the
4 smelling salts and her physical condition. It doesn't
5 contain any statements from her, whatsoever. I think
6 at one point she moans or says something
7 unintelligible. The third portion is Officer
8 Cooper's. Officer Cooper and Eddy spoke with the
9 victim in the ambulance, and none of those statements
10 -- again, I took quite a bit and condensed it and
11 picked portions where there was nothing of real
12 significance being said, but enough to show that the
13 victim's physical state, how intoxicated she was, how
14 incoherent she was. Your Honor, I think, will be able
15 to see. There is really nothing there offered for the
16 truth of the matter asserted. It is just going to
17 show really her state of mind and physical condition.

18 THE COURT: How long is that, please?

19 MS. WALTER: Probably all three, maybe 10
20 minutes.

21 THE COURT: Have you provided a copy to the
22 defense?

23 MS. WALTER: I think I did. I lost track at the
24 end, it was kind of a flurry.

25 MR. LONG: I haven't seen the condensed version,

1 but I've seen the totality of it.

2 THE COURT: Totality, but not this condensed
3 version?

4 MR. LONG: Correct.

5 THE COURT: Do you need to see that before you
6 make your argument?

7 MR. LONG: Yes, sir, because we might --

8 THE COURT: Let's play it.

9 MS. WALTER: For the record, this is marked
10 Exhibit 7. This is Officer Eddy's body camera.

11 (Video is played.)

12 MS. WALTER: Do you want to address them all at
13 once, or each?

14 THE COURT: One at a time. What is your
15 objection, Mr. Long.

16 MR. LONG: Your Honor, I don't object to the
17 video in and of itself. It is the content, hearsay
18 and inadmissible statements within the video that I
19 object to, specifically at the beginning. I did not
20 write down the time, but in the beginning the
21 defendant is immediately taken into custody. He had
22 handcuffs. He's questioned, not read his Miranda
23 rights, and he responds. So I make a motion to
24 suppress any statements that he made, because Miranda
25 was not given, but he was in custody and being

1 questioned.

2 THE COURT: You object?

3 MS. WALTER: Your Honor, I don't think that is
4 accurate with everything that the defendant said,
5 because, actually, when the defendant is being led
6 away, there are no questions asked of him. The State
7 certainly concedes he was in custody, but not an
8 interrogation going on.

9 THE COURT: He is placed in custody and asked a
10 question, and there is some response by him.

11 MS. WALTER: I agree for that one particular
12 statement, however -- and it is fairly to the close to
13 the beginning, but as he is being led away, there are
14 no questions being asked of him, and he is speaking.

15 MR. LONG: If I could respond, Your Honor?

16 THE COURT: Yes.

17 MR. LONG: If I'm able to understand, he -- said
18 he again is responding for the second time to the
19 question that was originally asked.

20 THE COURT: Let's go back to the beginning where
21 they ask him a question when he's placed under arrest.

22 (Video is played.)

23 THE COURT: Is there any reason that the video
24 should not be stopped after she sits up and makes some
25 unintelligible noises? The rest is milling around and

1 making comments, so it will stop after she sits up and
2 makes the unintelligible remark. Thank you.

3 (Video is played.)

4 THE COURT: Is that the comment you were
5 talking about, Solicitor?

6 MS. WALTER: Yes, that is not made in response to
7 any question.

8 THE COURT: I find it is responsive to the
9 questions and the prompting of the officer when he
10 asks the question. That will be suppressed, thank
11 you.

12 MS. WALTER: So, Your Honor, if we -- we do have
13 the ability to simply edit sound; is that sufficient?

14 THE COURT: I don't have a problem with that. So
15 that is the questions and the answers?

16 MS. WALTER: Yes, Your Honor. The person who
17 will be doing the actual redacting is sitting in
18 court, so I can do it from, Put your hands behind your
19 back, when he's handcuffed, and then through here to
20 the end of what he just said.

21 THE COURT: Whatever it is he is saying. Then
22 stop it.

23 MS. WALTER: After she makes the sound.

24 THE COURT: After EMS gets her sitting up.

25 MR. LONG: Can we see where that is, Your Honor,

1 just to make sure? There are a couple other
2 statements in there that I think are inappropriate.
3 The next happens at 2:55. It's the officer saying,
4 It's probably going to be a CSC. At 2:56, he's
5 talking to, I believe, officer Cooper, and Officer
6 Eddy said, It is Alqi, and he said, I tried to help
7 her.

8 THE COURT: That clearly comes from his response
9 that he answered in response to the officer's
10 questions, that part. The other one, whether it is
11 going to be -- since he's clearly on trial for
12 attempted CSC, I find no issue with that. All right.

13 MR. LONG: At the end at 2:57 the officers are
14 looking in the sand and speculating.

15 THE COURT: That is already stopped.

16 MS. WALTER: It's stopped.

17 MR. LONG: Okay.

18 MS. WALTER: Your Honor, this one will be
19 attempting to revive the victim.

20 THE COURT: Okay.

21 (Video is played.)

22 MS. WALTER: We redacted some portions of the
23 audio already where we felt it was inappropriate.

24 THE COURT: Objection to that.

25 MR. LONG: It duplicates what the original video

1 was. I don't see that this has extra value or weight
2 than the other video.

3 THE COURT: I think it is clear the other one
4 gives the jury a better understanding of the scene.
5 Let's have the third one.

6 MS. WALTER: It just takes the CD a moment to
7 catch up.

8 (Video is played.)

9 THE COURT: Mr. Long.

10 MR. LONG: It is the victim that is not available
11 for cross-examination, so it is clearly a violation of
12 my client's Constitutional right to insert such
13 statements that I cannot cross-examine her on. The
14 videos establish she's intoxicated, and at the end the
15 officer said -- I'm not sure which one -- I think you
16 were sexually assaulted, I want you to go to the
17 hospital. That goes to make a conclusion of the law
18 that is in question, so I would object to this coming
19 in.

20 MS. WALTER: Your Honor, it is somewhat hard to
21 have other specific statements pinpointed, but she
22 essentially says her name, okay. So that is not
23 offered for the truth of the matter asserted. We can
24 get her identity somewhere else. It is her physical
25 condition, how distraught and truly incoherent she is,

1 because although she's given her name and she's an
2 American citizen, her other responses are largely
3 unresponsive. Certainly nothing in that points to the
4 defendant specifically. I believe it was Sergeant
5 Hall that said he wanted her to go to the hospital.
6 That is a statement of intent not offered for the
7 truth of the matter asserted.

8 THE COURT: Before that he clearly says I think
9 you have been a victim of a sexual assault and trying
10 to elicit a response, so that part clearly is
11 improper.

12 MS. WALTER: We can take that out, Your Honor.

13 THE COURT: As to the beginning portion, I don't
14 know how long it lasts, but that would set the scene
15 as far as either a witness from EMS or one of the
16 officers present saying that was her condition at the
17 time and to play a minute or two or so of that, I
18 don't have a problem. That establishes her condition,
19 but, certainly, definitely well before he starts
20 asking that -- starts inquiring, it is clear he's
21 trying to get information and answers from her as to
22 what may or may not have occurred from that period on,
23 that needs to come out. To establish some witness
24 setting forth, you know, if it is EMS or whoever got
25 her in the ambulance, trying to get basic information

1 as to who she is and this is her condition at the
2 time. So a minute or two of that, I don't have a
3 problem.

4 MS. WALTER: I want to be sure I understand your
5 order, so I could follow it.

6 THE COURT: If you want me to pick a point in
7 time -- I can't tell you because there is no timer. I
8 wasn't looking on that, so I can't tell you at a
9 minute 02 to stop, but something that would clearly
10 show her condition, ability to respond to a question,
11 you know, what's your name, who are you, that sort of
12 thing, I don't have a problem with as far as it would
13 illustrate the testimony of a particular witness,
14 again, either an officer or EMS saying at the current
15 time we're trying to treat her or I was trying to help
16 EMS, and this is what we observed and this is clearly
17 her condition at that point in time.

18 MS. WALTER: Right. And I will pick a portion,
19 but -- again, I wasn't writing down the time stamps.
20 If the statement is in there, I will blur it out. I
21 think you were a victim of a sexual assault, if that
22 occurs within two minutes, I'll take it out.

23 THE COURT: Clearly when he starts that, there is
24 no question that none of that can be played.

25 MS. WALTER: None of the audio?

1 THE COURT: None of the video from that point on.
2 None of that point in time from when he starts that, I
3 believe you are a victim of a sexual assault, or some
4 comment of that, stop it clearly before that, and that
5 is the end of the video.

6 MR. LONG: As you were talking, I remember. The
7 full video, it shows not long after that that she kind
8 of comes to her senses and starts answering questions
9 intelligibly, so this will mislead the jury to think
10 that she was out of her mind during that process, when
11 not long after that, she tells them, I don't want to
12 go to the hospital, I don't want a sex rape kit, I was
13 not assaulted, all of that is intelligent statements
14 made by her. If the jury sees this taken out of
15 context, they are going to think that she was not able
16 to make any statements that night.

17 THE COURT: Is that what occurs afterwards?

18 MS. WALTER: No, Your Honor. In response to what
19 is your address, she starts screaming K-E-S-S-L-E-R.
20 That is not a coherent response. That was her last
21 name. Yes, she says she doesn't want to go to the
22 hospital, but what she's saying is, I don't want to
23 be, I don't want to be, I don't want to be sexually
24 assaulted.

25 MR. LONG: No. No.

1 MS. WALTER: Well, the end of this --

2 THE COURT: I appreciate that, and your objection
3 is noted, Mr. Long. Solicitor, you will comply with
4 the Court's requirements. All right.

5 MS. WALTER: Motion of limine to exclude evidence
6 of bite marks.

7 THE COURT: Who is making this statement?

8 MS. ANDREW: The State would present the
9 testimony of Officer Eddy, as well as Crime Scene
10 Investigator David Bailey, who photographed the bite
11 marks. We would be introducing the photographs of
12 bite marks and scratches on the defendant's arm, and
13 the nurse, Teresa George, who did the suspect kit on
14 the defendant.

15 THE COURT: Let's talk about the nurse and CSI
16 person in relation to the nurse's observations of
17 these bite marks. When did the CSI person take these
18 photographs, before or after?

19 MS. ANDREW: After the nurse did her examination.

20 THE COURT: After?

21 MS. ANDREW: Yes, sir. He was standing outside
22 of the door at the hospital, and he went in when she
23 finished, and took photographs.

24 THE COURT: So, if necessary, required by
25 Mr. Long, we had CSI come in and say he took

1 photographs, those are the photographs and they
2 accurately reflect that. Mr. Long, please listen. If
3 not required by Mr. Long, I would limit it to the
4 nurse saying as a result of her examination what she
5 did, I see these bite marks, show photographs, are
6 these accurate and true representations of what you
7 saw on the victim at the time you did your
8 examination, all right.

9 If necessary, for identification purposes of the
10 photographs, if required by Mr. Long, then the CSI
11 person will come in and testify what their job is,
12 what they do as a result of the nurse indicating,
13 photographed, and that is the result of that. I do
14 not have -- also, once that is done, I don't know when
15 these people are going to testify, but if you need to
16 have them -- Officer Eddy come back and say, At the
17 time I found the alleged victim on the sand, I noticed
18 this, and those photographs are an accurate and true
19 representation of what I saw that night in the
20 ambulance, or whatever it is, I don't have a problem
21 with that. All right. Your objection, Mr. Long?

22 MR. LONG: The objection is that there is no
23 evidence linking the bite marks to the victim. There
24 has been no forensic evidence to show that they were
25 the teeth marks or bite marks of the victim. The

1 State had ample opportunity and resources to do a
2 proper forensic evaluation to determine that the bite
3 marks found on the defendant's body came from the
4 victim. There is no establishment of that. So,
5 therefore, any reference that the bite marks on the
6 defendant's body came --

7 THE COURT: I'm confused. These are bite marks
8 on the victim?

9 MS. WALTER: On the defendant.

10 THE COURT: On the defendant.

11 MR. LONG: I misspoke.

12 THE COURT: On the defendant.

13 MR. LONG: And the allegation is that they came
14 from the victim.

15 THE COURT: All right. How did we come about and
16 get photographs of bite marks?

17 MS. WALTER: Your Honor, Officer Eddy noticed
18 them when he saw the defendant on the beach.
19 Detective Allen noticed them when she was interviewing
20 the defendant. The nurse noted them when she was
21 examining the defendant. Crime Scene Specialist
22 Bailey took pictures of them. I have other responses,
23 but I'll wait.

24 THE COURT: Okay. All right. I don't have a
25 problem with that. If you don't have any evidence

1 that forensically links the bite marks to the victim,
2 and those are great cross-examination questions,
3 Mr. Long, pointing out the State cannot connect the
4 two in any way, but the fact that they were there.
5 I'm assuming -- this is assuming -- that testimony
6 from the nurse stating that in her professional
7 opinion, in her experience, that they were fresh, they
8 were not of any length, that they did not appear --
9 appeared to have been recently inflicted. If she
10 cannot give that testimony, then there is no way to
11 tie that to this -- those things could be three, four
12 weeks old, whatever it is. You have to have something
13 from a medical standpoint indicating that from the
14 nurse's opinion, in her experience, that they were
15 fresh wounds, whatever. If not, and she has no
16 opinion, can't give you an opinion, we're not talking
17 about it.

18 MS. WALTER: Over the lunch break I reconsidered
19 the State's position regarding the dash-cam video
20 based on Your Honor's ruling, and we will be
21 introducing that in our case in chief. One thing it
22 shows is a view of the defendant's left biceps with
23 not a mark on it. When he is arrested, within an
24 hour, he has the scratches on his shoulder, as well as
25 three bite marks on the arm. The State submits that

1 that is sufficient evidence linking --

2 THE COURT: So we're going back to -- so we're
3 clear -- the dash-cam video? We're talking about the
4 camera that was required to be installed in the
5 defendant's cab?

6 MS. WALTER: Yes.

7 THE COURT: So that is the video we're talking
8 about?

9 MS. WALTER: Yes, Your Honor.

10 THE COURT: So now the State intends to introduce
11 that into evidence?

12 MS. WALTER: Yes, Your Honor.

13 THE COURT: Okay. With that, then, you can
14 certainly tie that into the testimony of the officers
15 and what they observed, what the nurse observed and
16 what CSI took photographs of, all right. Thank you.

17 MR. LONG: The nurse, is she going to testify as
18 an expert witness as to bite mark identification?

19 THE COURT: I don't know.

20 MR. LONG: I haven't received any type of notice.

21 THE COURT: I don't know. If that is going to be
22 her testimony, I'll hear your objection at the time.

23 What other motions?

24 MS. WALTER: I believe that covers it.

25 THE COURT: Do you know of any other motions,

1 Mr. Long?

2 MR. LONG: No, Your Honor.

3 THE COURT: So you are prepared to get started at
4 9:00 in the morning?

5 MS. WALTER: Yes, Your Honor.

6 MR. LONG: Yes, sir.

7 THE COURT: All right. So you come up here and
8 talk to me for a second. For the purposes of the
9 motion, is there any problem with the in-camera video
10 being a part of the record, for the purpose of the
11 motion?

12 MR. LONG: No, Your Honor.

13 MS. WALTER: No, Your Honor.

14 (Whereupon, the proceedings concluded.)
15
16
17
18
19
20
21
22
23
24
25

1 CERTIFICATE OF REPORTER

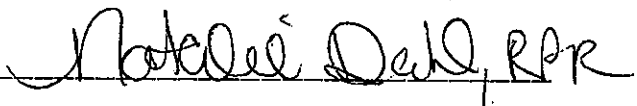
2 State of South Carolina)

3 County of Horry)

4
5 I, Natalie Dahl, Official Court Reporter for the
6 State of South Carolina, do hereby certify that the
7 foregoing is a true, accurate and complete Transcript
8 of Record of the proceedings had and evidence
9 introduced in the trial of the captioned case,
10 relative to appeal, in the Court of General Sessions
11 for Horry County, South Carolina, on the 31st day of
12 July, 2017.

13 I do further certify that I am neither of kin,
14 counsel, nor interest to any party hereto.

15
16 March 12, 2018

17
18 
19 Natalie Dahl, RPR

20 Court Reporter
21
22
23
24
25

FORM 5

STATE OF SOUTH CAROLINA)

County of HORRY)ALQ1 DHIMO)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2021 CP 250 146d

APPLICATION FOR
RELIEF N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC
JUL 11 2021 9 A 11:47
FILED
HORRY COUNTY

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention _____
2. Name and location of Court which imposed sentence HORRY COUNTY
GENERAL SESSION
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) ATTEMPTED CSC 3RD
 - (b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 01-18-2018
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) ☒ after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. STATE OF SOUTH CAROLINA APPELLATE COURT
- ii. STATE OF SOUTH CAROLINA PETITION APPELLATE COURT
- iii. STATE OF SOUTH CAROLINA SUPREME COURT
- (b) the result in each such Court to which you appealed:
- i. AFFIRMED Judgment TRIAL COURT
- ii. PETITION DENIED
- iii. BASED VOTE OF COURT THE PETITION FOR WRIT DENIED
- (c) the date of each such result:
- i. JANUARY 1, 2020
- ii. JUNE 29, 2020
- iii. NOVEMBER 25, 2020
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. DECIDE THIS CASE WITHOUT ORAL ARGUMENT
- ii. AFFIRMED Judgment with oral argument
- iii. DENIED PETITION of a WRIT of CERTIORARY
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) SOUTH CAROLINA
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) SOUTH CAROLINA
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? YES
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

YES, MY LAWYERS NOT REPRESENT
MY ALL FACT and TRIAL JUDGES NOT FAIR.

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. ALL MY VIDEO NOT REPRESENT
- ii. THE LAWYERS NOT REPRESENT ALL FACT
- iii. NOT FAIR COURT TRIAL

(b) the proceedings in which each ground was raised:

- i. THE FACT the VICTIM NEVER
- ii. TESTIFIED, IS DEAD because overdose
- iii. DEAD often Accused ME OYE DOSE

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) THE FACT VICTIM NEVER TESTIFIED
 (b) THE COURT NEVER MAKE DISMISS WITHOUT VA
 (c) NEVER PROVED THE TRUTH

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
 (b) your trial, if any? ATTORNEY (JOHN D. LONG,
 (c) your sentencing? ATTORNEY (JOANNA K. DELANEY
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? ATTORNEY (JOANNA K. DELANEY
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:

- i. JOHN D. LONG 1201 LAUREN ST, CONWAY, SC
 ii. JOANNA DELANEY 1300 LADY ST, COLUMBIA, SC
 iii. JOANNA DELANEY 1300 LADY ST, COLUMBIA, SC

- (b) the proceedings at which each such attorney represented you:

- i. TRIAL COURT, CONWAY, SC
 ii. APPEAL COURT, COLUMBIA, SC
 iii. SUPREME COURT, COLUMBIA, SC

19. State clearly the relief you seek in filing this application:

STATE of SOUTH CAROLINA

20. Are you now under sentence from any other court that you have not challenged?

NO, I am not, i am FREE and
i am not be damn when the TRUTH come out.

STATE OF SOUTH CAROLINA)

County of HORRY)

VERIFICATION

I, ALQI DHIND, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Alqi Dhind

SWORN to and subscribed before me this 9
day of March, 2021.

Julie Rice Baller (L.S.)
Notary Public

My Commission Expires: 9-5-2024

FILED
HORRY COUNTY
2021 MAR -9 A 11:47
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, ALQI DHIMO, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Alqi Dhimo
~~Applicant~~

Alqi Dhimo

SWORN or affirmed to and subscribed before me this

9 day of March, 2021.

Julie Rice Hallen
Notary Public

My Commission Expires: 9-5-2024

FILED
HORRY COUNTY
2021 MAR -9 A 11:47
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
	)	
Alqi Dhimo	)	Case No. 2021-CP-26-1461
	)	
Applicant,	)	RETURN AND MOTION FOR A
	)	MORE DEFINITE STATEMENT
v.	)	
	)	
State of South Carolina	)	
	)	
Respondent.	)	

NOW COMES Respondent, the State of South Carolina, making its return to Applicant Alqi Dhimo's March 9, 2021 application for post-conviction relief. Respondent would respectfully show this Court:

I. PROCEDURAL HISTORY

Applicant was previously confined in the South Carolina Department of Corrections.¹ Applicant was indicted for attempted criminal sexual conduct, third degree (2015-GS-26-04000), indecent exposure (2015-GS-26-04001), and kidnapping (2015-GS-26-04002) by the Horry County Grand Jury at its September, 2015 term. Applicant was represented by Attorney John Reuben Long, II, and Assistant Solicitors Mary-Ellen Walter and C. Leigh Andrew, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. The indictment for kidnapping was dismissed, *nolle prosequi*. Applicant proceeded to a jury trial on January 8, 2018, before the Honorable Steven H. John. The jury acquitted Applicant of indecent exposure but convicted him, as indicted, of attempted criminal sexual assault, third degree. Judge John then sentenced him to eight years' imprisonment and required him to register as a sex offender.

¹ Records from the South Carolina Department of Corrections indicate Applicant was released on or about November 27, 2019.

Applicant filed a timely notice of appeal and the appeal was perfected by Joanna Delaney, of the South Carolina Commission on Indigent Defense. Applicant raised the following issue on appeal:

1. Whether the trial court erred in refusing to grant appellant a directed verdict on the charge of attempted third degree criminal sexual conduct where it was undisputed the complainant was voluntarily engaging in foreplay with appellant prior to being found unconscious on the beach, where there was no direct evidence and no substantial circumstantial evidence that appellant attempted to commit an overt sex act on a physically helpless, mentally defective, or mentally incapacitated person?

The South Carolina Court of Appeals affirmed the conviction and dismissed the appeal. *State v. Dhimo*, Op. No. 2020-UP-031 (S.C. Ct. App., Filed February 5, 2020). Applicant filed a petition for writ of certiorari with the South Carolina Supreme Court, which was denied on November 25, 2020. The remittitur was sent on December 4, 2020. This PCR application follows.

II. FACTUAL HISTORY

On June 21, 2015, Victim and her boyfriend Justin Stephenson attended a barbecue at Victim's Mother's house. By 10:00 p.m., the time Stephenson and Victim left the party, the latter was intoxicated. On the way home, Victim and Stephenson got into an argument over smoking cigarettes inside the vehicle and loud music when Stephenson pulled into a gas station. Victim exited the vehicle and refused to return home with Stephenson. Victim texted Stephenson and informed him she would take a cab home. (Tr.p.54, line 16–Tr.p.58, line 8).

Security guards Benjamin Thompson and Joyce Chestnut Dixon were on patrol at the Grand Shores Ocean Front Tower when they observed a taxi cab parked at the building with the engine still running. Concerned, they began looking around the area to see if they could find the driver or someone associated with the cab in the vicinity. As they approached the beach, they heard someone "hollering" at them to stop moving and stay away. Looking around, they saw a

male figure approximately twenty-feet away "either kneeling or laying down on his side" who then jumped up. He was wearing a dark-colored shirt and white underwear pulled down around his knees, but was not wearing any clothing around his crotch area; they both observed Applicant's uncovered penis. Additionally, they saw a human-shaped figure on the ground by Applicant. Thompson asked Applicant whether "everything was okay," but did not receive a response to his question. Instead, Applicant moved over towards a "white object" and started to get dressed. Thompson maintained visual contact with Applicant the entire time and contacted the police. (Tr.p.109, line 1–Tr.p.127, line 23; State's Exhibit 12).

Officer Daniel Eddy was the first officer to respond to the scene. When he arrived, he observed a taxi cab parked sideways in the beach access and spoke with security guards who confirmed they reported the man. Officer Eddy began walking down the beach to locate the reported man when he located Applicant standing up. He also found Victim, laying with her face down in the sand, almost as if she were in the fetal position. He noticed Victim's bathing suit bottom/underwear were pulled to the side, exposing her privates. When he tried to wake Victim, she was unresponsive. He called for backup and EMS while he detained Applicant. (Tr.p.64, line 12–Tr.p.68, line 2).

When Officer Eddy's backup arrived, they were able to wake Victim using smelling salts. However, she was heavily intoxicated, unable to walk by herself, and could not provide answers to basic questions such as her name or where she lived. She was placed inside the ambulance when it arrived. While placing Applicant in his vehicle, Officer Eddy observed scratch marks behind his left shoulder and bite marks down his arm. After returning to the ambulance, Officer Eddy discovered Victim was still unable to answer basic questions. However, she was now visibly upset and crying. Later, in Applicant's cab, Officer Eddy found Victim's purse and cellular phone.

(Tr.p.68, line 2–Tr.p.74, line 4; Tr.p.77, line 23–Tr.p.78, line 23; State’s Exhibit 19; State’s Exhibit 36).

Officer Zachary Cooper, the officer who used smelling salts to wake Victim, testified that in addition to being unable to provide basic information, Victim also threw up. Her speech was slurred and she was distraught the entire time officers spoke with her. Emotional, Victim constantly reiterated she just wanted to go home and get back to her boyfriend. She also had a powerful “odor of alcohol.” (Tr.p.89, line 20–Tr.p.108, line 7; State’s Exhibit 36).

Officer David Bailey, a crime scene specialist with the Myrtle Beach Police Department took Photos of Applicant after the crime and photographed bruising, scratches, and a bite mark on Applicant’s left upper arm. (Tr.p.256, line 13–Tr.p.266, line 8 State’s Exhibits 27–33).

Officer Scott Williamson collected evidence from Applicant’s cab, including the dashboard camera in the vehicle.² Officer Williamson viewed the video recorded by the record and noted it shows: (1) Applicant turning off the camera soon after initialing picking up Victim; (2) Victim, intoxicated, flirting with Applicant and telling him she “loved [him]”; (3) Applicant requesting Victim that she “[l]et [him] love [her]”; (4) Victim passing out in the driver’s seat of the cab and Applicant getting her out of the vehicle, at which time she told him to “stop it,” “get away from me,” and other statements. (Tr.p.161, line 19–Tr.p.177, line 18; State’s Exhibit 16).

Chad Morenus, a bar tender at Jimmagan’s Pub in Myrtle Beach, was working on the night of June 21/22, 2015 when he saw Victim and Applicant at the bar. He served them three or four shots of Crown Royal Apple to Victim and a similar amount to Applicant. (Tr.p.132, line 23–Tr.p.140, line 13).

² The dashboard camera was installed in Applicant’s taxi cab as a condition of bond from a 2014 charge of first degree criminal sexual conduct. (Pretrial Tr.p. 20, line 19-23).

Emily Hennig-Ryan, a nurse with Grand Strand Medical Center, treated Victim when she was taken to the hospital that night/morning. She collected various samples, including fingernail scrapings, from Victim. She testified Victim consented to the use of the kit and she was prohibited to use rape kits on the victims of sexual assault without their consents. Jennifer Michelle Brown, a forensic toxicologist with SLED, tested blood samples obtained from Victim at the hospital and concluded her blood alcohol concentration (BAC) was 0.169 percent at the time it was drawn, and would have been around 0.332 percent at the time of her assault. According to Brown, someone with such a significant BAC loses control of her motor functions, is usually unconscious and asleep and at risk for death. Catherine Leisy, a forensic scientist with SLED, analyzed Victim's fingernail scrapings. The partial DNA profile developed from the major contributor to the mixture under Victim's right fingernails matched Applicant; the partial DNA profile developed from Victim's left fingernails was insufficient for interpretation. (Tr.p.194, line 2–Tr.p.219, line 5; Tr.p.240, line 20–Tr.p.251, line 25; State's Exhibit 40).

Detective Carol Allen interviewed Victim and Applicant after they were taken to the police station in the early hours of June 22, 2015. Victim was loud, screaming, and crying and not in "any shape to be interviewed at that time." Applicant, however, did not appear to be intoxicated and was able to answer all of her questions. He did not inform Detective Allen that he and Victim stopped by Jimmagan's Pub or that his interaction with Victim transitioned from a cab ride to a date. He eventually admitted Victim was "completely passed out and would not wake up." (Tr.p.270, line 11–Tr.p.301, line 1 State's Exhibit 3).

Detective Hugh Jones reviewed the dash cam video of Applicant's cab. Notably, Applicant picked up Victim at approximately 1:09 a.m., and had a brief conversation before the video stopped. The recording resumed approximately thirty minutes later at 1:39 a.m., when the two are

leaving Jimmagan's. Applicant chose to drive around rather than take Victim directly home. After a second stop, Victim enters the driver's seat and begins driving towards her home, but ended up stopping at the beach access where the cab was found. Further, Detective Jones observed Applicant never activated the fare meter in his cab. Victim was unable to recall any of the events which occurred after the stop at Jimmagan's.³ (Tr.p.304, line 16–Tr.p.328, line 15; State's Exhibit 16).

III. CURRENT APPLICATION

In his current application for post-conviction relief, Applicant alleges he was being held in custody unlawfully for the following reasons (verbatim):

1. Yes, my lawyers not represent [illegible] all fact and trial judges not fair.
 - a. All my video not represent. The lawyers not represent all fact. Not fair court trial.
 - b. The fact the victim never testified. Is dead because overdose. Dead after accused me overdose.
 - c. The fact victim never testified. The court never make [illegible] without [illegible]. Never proved the truth.

Attached and incorporated herein are the Horry County Clerk of Court's records giving rise to the subject convictions, Applicant's records from the South Carolina Department of Corrections, the records from Applicant's direct appeal, the pretrial and trial transcript, and the current application for post-conviction relief. Respondent reserves the right to alter or amend this return upon receipt of any relevant materials.

IV. RESPONSE TO ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent interprets Applicant's allegation as one claim of ineffective assistance of counsel for failure produce certain pieces of video evidence, and one claim of ineffective

³ The victim of this crime unfortunately passed away from unrelated causes about five months after Applicant's attack occurred. (Tr.p. 49, line 7-9).

assistance of counsel for failure to confront his accuser, who had passed away prior to the date of his trial. The State submits that Applicant's allegations of ineffective assistance of trial counsel are without merit.

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989).

"The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To establish prejudice, the applicant must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

Strickland requires trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688–689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct

is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). In making a fair assessment of attorney performance, a court must make every effort to “eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689.

Counsel must, at a minimum, make some effort to interview potential witnesses identified by the defendant, and make an independent investigation of the facts and circumstances of the case. *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011); *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). To support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses’ testimony in a manner consistent with the rules of evidence. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant’s mere speculation about what the witnesses’ testimony would have been cannot, by itself, satisfy the applicant’s burden of showing prejudice. *Id.*

Here, Applicant cannot satisfy either requirement of *Strickland*. The allegation that Applicant’s counsel was ineffective because the Victim predeceased his trial is plainly absurd and clearly without merit. Furthermore, there is no indication of what video Applicant is referencing, what it may show, or how it may have affected his case. Therefore, the record likely does not conclusively refute or disprove Applicant’s allegations of ineffective assistance of trial counsel. The State therefore moves later herein for a more definite statement, and requests an evidentiary hearing to fully resolve the issues presented in an amended application. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (providing an evidentiary hearing shall be held when a

PCR application “alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court”).

V. MOTION FOR A MORE DEFINITE STATEMENT

The State submits Applicant’s claims of ineffective assistance of counsel are without merit. However, it is impossible for the State to adequately respond to Applicant’s allegations because Applicant has completely failed to clearly define his allegations and to provide any specific facts to support such claims. “[M]ere allegations of incompetency or ineffectiveness of counsel will not ordinarily suffice as grounds for a new trial under the Post-Conviction Procedure Act. The bare assertion by the [applicant] that he was deprived of adequate and effective assistance of counsel is insufficient.” *Coardes v. State*, 262 S.C. 493, 497, 206 S.E.2d 264, 265 (1974); *see* S.C. Code Ann. § 17-27-50 (2014) (requiring an applicant to “specifically set forth the grounds upon which the application is based”); *see also* Rule 8(a)(2), SCRCP (requiring all civil pleadings to include “a short and plain statement of the facts showing that the pleader is entitled to relief”); Rule 71.1(d), SCRCP (“Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.”).

Accordingly, the State moves for Applicant, through counsel, to amend his application to provide a more definite statement of his allegations of ineffective assistance of counsel pursuant to Rule 12(e), SCRCP and the Post-Conviction Procedure Act.

VI. ANY FUTURE AMENDMENTS AND INVOCATION OF DISCOVERY

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. *See* Rule 11, SCRCP. *Pro se* filings will not be considered at the

PCR hearing. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State pursuant to *Love v. State*, 428 S.C. 231, 834 S.E.2d 196 (2019), or, alternatively, the State will request a continuance in the matter. *Id.*, 428 S.C. at 245, 834 S.E.2d at 203 (Kittredge, J., dissenting) (“If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.”).

If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, the State reserves the right to move to dismiss this allegation or claim. S.C. Code Ann. §§ 17-27-10 to -160; Rule 71.1, SCRCP. *See also* Rules 15(a)–(b), SCRCP. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State. *See* Rule 15(a), SCRCP.

Pursuant to S.C. Code Ann. § 17-27-150, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, the State requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to the State well in advance of the evidentiary hearing. The State reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to the State.

VII. GENERAL DENIAL

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

[Conclusion and signature page follows]

VIII. CONCLUSION

WHEREFORE, the State respectfully requests this Court grant its motion for a more definite statement and then convene an evidentiary hearing on the allegation of ineffective assistance of counsel.

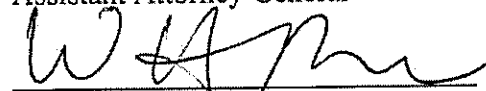
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

WILLIAM H. RAY
Assistant Attorney General



ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

April 26, 2021

STATE OF SOUTH CAROLINA **TRANSCRIPT OF RECORD**

COUNTY OF HORRY CASE NO.: 2021-cp-26-1461

CERTIFIED ORIGINAL

November 30, 2022

BEFORE: The Honorable H. Steven DeBerry, IV

ALQI DHIMO,

Applicant,

vs.

THE STATE OF SOUTH CAROLINA,

Respondent.

APPEARANCES:

Christopher Geel, Esq.
 Appearing for the Applicant.

Chelsey F Marto, Esq.
 Appearing for the Respondent.

Natalie Dahl, RPR
Registered Professional Reporter,
State of South Carolina Official Court Reporter

I N D E X

WITNESSES:

ALQI DHIMO

Direct Examination by Mr. Geel.....	7
Cross Examination by Ms. Marto.....	19

JOHN LONG

Direct Examination by Ms. Marto.....	21
Cross Examination by Mr. Geel	28
Redirect Examination by Ms. Marto.....	42
Recross Examination by Mr. Geel.....	42

MARY ELLEN WALTER

Direct Examination by Ms. Marto.....	43
Cross Examination by Mr. Geel.....	46

APPLICANT'S EXHIBITS

EXHIBIT NO.	MARKED	ADMITTED
-------------	--------	----------

(NONE MARKED OR ADMITTED)

1 NOTE: Pursuant to Rule 607 (h)(1)(B), SCACR "A
2 COURT REPORTER SHALL RECEIVE THE FEE OF \$1.00 PER
3 PAGE FOR FURNISHING A COPY OF A PREVIOUSLY PREPARED
4 TRANSCRIPT." All requests for a copy of the
5 enclosed transcript shall be sent to:

6 Natalie Dahl, RPR
7 P.O. Box 762
8 Conway, SC 29526

9 P-R-O-C-E-E-DI-N-G-S

10 MS. MARTO: First we have Alqi Dhimo versus
11 the State of South Carolina, Case No.

12 2021-CP-26-01461. He's no longer confined in the
13 South Carolina Department of Corrections and was
14 indicted for attempted criminal sexual conduct
15 third degree, indecent exposure, and kidnapping.

16 He was represented by Attorney John Long, and
17 the prosecutors were Mary Ellen Walter and Leigh
18 Andrew.

19 The indictment for kidnapping was dismissed,
20 and he proceeded to jury trial on January 8, 2018
21 before Judge John. He was acquitted of indecent
22 exposure, but convicted as indicted of attempted
23 criminal sexual assault third degree. He was then
24 sentenced to eight years imprisonment and required
25 to file as a sex offender.

26 He filed a Notice of Appeal that was
27 perfected by Joanna Delaney. The Court of Appeals
28 affirmed the conviction and dismissed the appeal.

1 He then petitioned the State Supreme Court, which
2 was denied, on November 25, 2020. The remittitur
3 was sent December 4, 2020. The application filed
4 March 9, 2021. And the State's return made
5 April 26, 2021.

6 With that, I'll hand it over to Mr. Geel.

7 MR. GEEL: Good morning. Brief housekeeping.
8 We have submitted an amended application with three
9 additional issues. Do you have a copy of that?

10 THE COURT: If you have one, I'll take it.

11 MR. GEEL: Before I call Mr. Dhimo to
12 testify, we have enumerated three additional
13 issues.

14 As Ms. Marto explained, this case stemmed
15 from an alleged sexual assault. Briefly, Your
16 Honor, what was alleged is that the victim in this
17 case called a cab on the evening of June 21, 2015.
18 The allegations at trial is that she was very
19 intoxicated and called the cab after an argument
20 with her boyfriend.

21 Later that evening, Mr. Dhimo's cab was found
22 parked near a beach access. People that happened
23 upon the scene allege that they saw a human figure
24 on the ground next to Mr. Dhimo and he had his
25 pants down. The officer who responded indicated

1 that the victim -- alleged victim was nonresponsive
2 and intoxicated.

3 Mr. Dhimo was ultimately charged with CSC at
4 issue here, and the alleged victim in this case was
5 deceased before trial. So some issues came up in
6 terms of getting statements and things of that
7 nature.

8 What we have enumerated is issues here on
9 that amended application. First, there was a
10 failure to object to improper expert testimony
11 about alcohol -- retrograde alcohol extrapolation.
12 What we are alleging there is that there was an
13 expert witness who speculated about what the
14 victim's blood alcohol content was at the alleged
15 attack.

16 The second issue is that there is a failure
17 to object to improper opinion testimony. One of
18 the State's witnesses offered their opinion on
19 multiple instances of what were the consistencies
20 and inconsistencies of Mr. Dhimo's version of
21 events versus the evidence. We submit that that
22 was improper and should have been objected to.

23 And, lastly, that there is a failure to
24 object to a comment on the defendant's indication
25 of his right to remain silent. During a custodial

1 statement, Mr. Dhimo invoked his right to counsel,
2 and it was initially redacted. We'll get into the
3 details more, but the Court essentially told the
4 prosecutor that she could elicit the fact that he
5 had invoked his right to counsel, and then there
6 was improper remarks in that regard without a
7 contemporaneous objection from counsel.

8 So that is a brief sketch. Mr. Dhimo filed a
9 pro se application as well that enumerated some
10 failures on behalf of counsel to present the case
11 adequately, and Mr. Dhimo will get into that more
12 during his testimony.

13 So if the State does not have any more
14 opening remarks, we're ready.

15 THE COURT: Tell me, who was the defense
16 counsel?

17 MR. GEEL: Mr. Long, John Long.

18 THE COURT: Oh, yeah. I got you. Thank you.

19 MR. GEEL: The applicant calls Alqi Dhimo.

20 Your Honor, is it all right if I remain
21 seated at defense table?

22 THE COURT: Sure.

23 (ALQI DHIMO, having been duly sworn,
24 testified as follows:)

25

1

2

3

4

5

12

13

16

17

19

20

22

23

24

25

1 represented right for my kidnapping, was not
2 represent with my kidnapping. The State charged me
3 with kidnapping. Then I be in jail. Mike was
4 supposed to respond to court. He needed to say
5 he's not kidnapping, but judge denied kidnapping.

6 Q You hired Mr. Long as your attorney?

7 A At the time after I be in jail.

8 Q You were unhappy with your prior lawyer?

9 A Correct. Not happy with my prior lawyer
10 because he not defend me.

11 Q Mr. Dhimo, just answerer the questions I ask.
12 We will have a chance to get into all of the
13 details.

14 A I will try.

15 THE COURT: Madam court reporter, are you
16 having a hard time?

17 THE COURT REPORTER: Yes, a little. If he
18 could slow down. I'm having a real hard time with
19 the accent.

20 THE WITNESS: I'm so sorry.

21 THE COURT REPORTER: Oh, no, it's okay.

22 THE COURT: Yes. Mr. Dhimo, if you could
23 slow way down. Just take your time.

24 MR. GEEL: Thank you, Your Honor.

25 Q (BY MR. GEEL) Mr. Dhimo, so after you hired

1 Mr. Long, try your best as you can remember, and I
2 know you don't remember exactly, but how long prior
3 to your trial was it that you hired Mr. Long?

4 A I believe about -- before trial, right?

5 Q Yes.

6 A About two years. Two years and half. I
7 believe something like that. Over two years. I'm
8 not sure exactly.

9 Q And, in your opinion, was it a sufficient
10 amount of time to prepare for trial? Did you have
11 concerns about him having enough time to prepare?

12 A The reason I hired Mr. Long, I trust
13 Mr. Long. They represent the facts in the
14 beginning. He represented me that all the stuff
15 that he's in possession. So when you believe your
16 lawyer, you believe him to do his job. Because I
17 don't know what the details of his job, so that is
18 why I hired him, because I believed him in the
19 beginning.

20 Q Let's talk about the trial preparation. You
21 met with Mr. Long to prepare for your trial?

22 A Correct.

23 Q Were you in jail at that time, or out of
24 jail?

25 A I was out of jail. I was bond with GPS

1 monitor.

2 Q When you met with Mr. Long, did you go to his
3 office?

4 A No. I was at J. Reuben.

5 Q Oh, okay. You were in jail?

6 A J. Reuben.

7 Q I misunderstood you. So he came to meet you
8 at the jail?

9 A Correct. Actually -- actually, I was in jail
10 for kidnapping. Did not bond. I was inmate in my
11 room. He say his partner, he help you. He's a
12 good partner. So I -- he gave me his card,
13 business. And then I called his office, and I told
14 him can you come here, and he said John come over
15 there to meet with me.

16 Q I'm trying to establish. Your meetings with
17 your lawyer were at the jail?

18 A Jail, J. Reuben.

19 Q How many times did you meet with him to
20 prepare for trial?

21 A I think two or three times.

22 Q Let's jump forward to the trial itself.
23 There are some issues you had with wanting to
24 testify at trial. Remember, slowly and clearly,
25 tell the Judge about that please.

1 **A** The trial?

2 **Q** Yeah. What you felt your lawyer should have
3 done differently at trial.

4 **A** The most important to me is they failed to
5 represent all the video. The video all represent
6 the fact I was being the victim, not suspect. They
7 try different way to prove it. I'm innocent.

8 **Q** Let's start -- you mentioned the video.
9 Speak slowly and clearly. What was the issue with
10 the video?

11 **A** The first, beginning, the first video, the
12 victim entered my cab. He cut it. He cut it.
13 Now, who cut that? Law enforcement? I don't know.
14 No idea. That is the most important part between
15 when I picked up when she go into bar. At the
16 beginning, she wants to go home, but when driving,
17 she said, no, I don't want to go home, because she
18 scared, threaten by boyfriend. She wanted to go to
19 Jimmie bar to drink. She wanted to meet new
20 boyfriend, whatever. But at the same time, she
21 told me, I fight for my drug. Because the drug,
22 she use it for a long time. I don't know how long,
23 but I find out later through my lawyer told me she
24 prior arrested seven times for drug. So they told
25 me that. Then she tell me I be on drug all times.

1 Because the boyfriend and the mother -- actually --
2 actually, she told me -- I do not remember, but
3 later, the boyfriend, her mother, or step-mom, he
4 was working for me, taxi driver. And I fired him
5 because he using drugs. He got caught with drugs
6 in my cab, then I fire him.

7 Later, I find out her boyfriend, her mother
8 is all on drugs. I don't know. My question is
9 where it was? This video be cutted, for some
10 reason.

11 Q Let's get back to the video. You were
12 talking about a video?

13 A Correct.

14 Q Stay on that subject. What are the
15 discussions you had with your lawyer about that?

16 A Never represent. There were never facts for
17 that. They don't have this video. They don't have
18 this video. He got -- all of the video he got, he
19 could not represent from State or police or
20 whatever. All the video is cutted.

21 Q Let me make sure I understand, so the Court
22 understands what you are saying. The videos you
23 received in discovery were cut. You mean edited,
24 portions were missing?

25 A Missing.

1 Q You discussed that with your lawyer?

2 A He knows, but he never can find it. Because
3 who cut that? It is a recording in my cab camera.
4 He ordered -- every time you start the cab, the
5 camera record by itself. That is why I relayed
6 that. I don't need to push. It records itself
7 right away. As soon as it turns off, right away.
8 You turn off, it stops. That is where cameras go.
9 But when you drive, the camera recorded.

10 So it be cutted. So who cut that? Why they
11 cut that? Speculation, all this stuff. That is
12 why all speculation. This video is cutted. Right
13 there, the police body camera video, the most
14 important body cam video, cut them. Cut them.
15 Leave only a piece and say, oh, you good. Oh, you
16 good. That's all.

17 The rest, he cut them. Even my Miranda law.
18 He arrest me and say you going to jail. He
19 arrested her first, then arrested me, going to jail
20 with handcuff.

21 Miranda law -- Miranda law, he never used it.
22 That is why the detective in my interview just be
23 so rude and disrespect, even though I was intoxi --
24 I don't know what is going on. I don't know why I
25 was there. I be toxi -- I be poisoned. Who

1 poisoned? Because there was no one. I was
2 poisoned, nobody knows that. Nobody represented
3 that.

4 Q Mr. Dhimo, let me ask you a quick question.
5 You had had the opportunity to testify at your
6 trial? You would have discussed that with your
7 lawyer, correct, whether or not to do what you are
8 doing today at your trial?

9 A Correct.

10 Q Tell the Judge and the Court a little bit
11 about your discussions with your lawyer about
12 whether you should testify at trial?

13 A Well, I told my lawyer -- he told me if you
14 testify, they are going to make guilty to you. I
15 said what do you mean? So for three things, you
16 are immigrant. Second, she's white. Third, she
17 lives in South Carolina. For all of this, you
18 cannot win. They actually going to add more
19 charge, and he is not prepared for that.

20 So I let him charge it, and I believe that.
21 So I trust him to do his job, but, no, I be guilty.
22 I was shocked with that, because I wasn't prepared
23 for that. I can't stand women in this country.
24 They are crackhead or prostitute. I love my wife.
25 I disappointed my family. I disrespect my wife and

1 kids. They know me very well. I don't want no
2 woman in this country. They are prostitute or
3 crackhead. I don't care. I have best woman in the
4 world right there behind you. I'm 35, married.
5 That is my child. I don't know why they don't stop
6 that in the beginning. Stop that accusing me of
7 kidnapping. I was kidnapped. Look, I was
8 kidnapped. I'm going to jail because my law, my
9 status, everything turned down. The Court turned
10 down. It's supposed to be a right for fair trial.
11 That is why I request new trial, new right. That
12 is all I needed, new trial to tell the truth,
13 because I'm only person telling the truth. Only
14 person that is going to hell because of people not
15 helping her, not helping her because she get ten
16 times going to jail for drug and alcohol. And
17 State and law enforcement --

18 Q You have to slow down.

19 A I help her. I help her.

20 Q You have to slow down. We are all trying to
21 follow what you're saying.

22 A I'm sorry, but I'm emotion because I was
23 accused for no reason, because I be accused for no
24 reason. I wasn't -- long time, I be long time --

25 THE COURT: Mr. Dhimo, if you will, please

1 slow down. Answer only the questions that your
2 attorney is asking. You are okay, but you
3 understand?

4 THE WITNESS: Yes, ma'am (sic). Yes, ma'am
5 (sic).

6 Q Let's get back to your discussion with your
7 lawyer. Your lawyer told you that it wouldn't be a
8 good idea to testify?

9 A Correct.

10 Q Did you want to testify anyway?

11 A I wanted to testify, and I wanted to stand up
12 any time, because I'm only person who know the
13 truth. Only person who know the truth.

14 Q Why is it that you ultimately decided not to
15 tell your side of the story at trial?

16 A I don't know. You have to ask the lawyer why
17 he do that. Why he not go digging in this trial,
18 not going through all the evidence. I don't know.
19 I don't know. But I'm trusting. I hired a lawyer.
20 I trust a lawyer. I'm not hiring lawyer not to
21 trust him. If I don't trust him, I want different
22 lawyer. But I trust him to do his job, and I
23 believe in the trial he will do the right thing,
24 but they go wrong. They go wrong. I see that.

25 Sometime when we are at the table together,

1 we argue together. I say, John, what are you
2 doing? We argue together even in trial. I say,
3 John, what are you doing? This is not right.

4 Q Other than the issues that we've already
5 touched on with you wanting to testify and your
6 lawyer telling you not to, and other than the
7 issues with the videos being cut, edited, were
8 there other things you talked with your lawyer
9 about that you wanted him to present that he didn't
10 present at trial?

11 A No. He not represent. He knows. Even --
12 even the money we pay for whatever she paid, it's
13 not my money. I never paid it. John didn't have
14 receipt because people give credit card. Johnny
15 have a receipt. She paid. I do not. He never
16 represented to Court. He never --

17 Q Is that something you would have been able to
18 testify to if you had testified at trial?

19 A Yes. I want there to be new trial. I'm out
20 of jail, and I got a job. God bless, because I got
21 a job because no one will hire me with that mark
22 put on my back. Can't work. No one hire me, but
23 I'm strong man. I have strong woman to support me.
24 I find a job and working so hard for my reputation.
25 And all of these people accusing me. This Court

1 decided my success, that I'm successful man,
2 because I be in this country and I worked so hard
3 to support my wife and family, not to be in this
4 position.

5 I never be to jail in my life. First time.
6 They accusing me for something I never go in my
7 mind. I never in my mind. I have beautiful woman
8 behind you.

9 THE COURT: Mr. Dhimo, answer the questions
10 your attorney is asking you.

11 Q Just one final question. Thank you. You
12 want this Court to grant you a new trial? You want
13 to go to trial again?

14 A If you do that, bless. That be new trial, at
15 least know the truth. Truth, that is all I want,
16 the truth. I don't want anything else, just the
17 truth. I need truth in new trial, in new, fair
18 trial. A right, not a different position. Not a
19 different position. New trial. New trial. I can
20 prove a lot of evidence one by one, because I got
21 all the evidence. Because I pay people to get to
22 resource for everything. I got all of the
23 documents, but never represent right in the court.
24 Never. Because I trust the lawyer. He is supposed
25 to represent me --

1 THE COURT: Thank you.

2 MR. GEEL: That is all I have. Thank you.

3 THE COURT: Mr. Marto.

4 CROSS EXAMINATION

5 BY MS. MARTO:

6 Q So you said counsel told you it wouldn't be a
7 good idea to testify at trial?

8 A Correct.

9 Q And are you saying that the video that you
10 and counsel received was cut before you got it?

11 A Yeah, cut it. He said they cut it. I don't
12 know why they do that. He knows that. How he know
13 that? I don't know every detail of that, but I
14 know they cut it, because I was present for the
15 video, everything that happened.

16 Q Are you saying that the taxi video and the
17 body cam were both cut?

18 A Yeah. They cut my taxi. Like I say, you
19 start my car, it operates directly. Doesn't
20 matter, it operates directly. If you turn off,
21 yes. Especially if you are driving, driving the
22 cab. Because I make it this way, not just for
23 protecting me, but protecting the customer as the
24 court order from my judge ordered and said, Please,
25 Dhimo, do that. Find specialty and do that,

1 because it protects not just you against accusing
2 you, but protecting the customer, and I did. I
3 paid a lot of money to get this technology, paid a
4 lot of money for this technology, not just my cab,
5 but three different cabs.

6 Q You said that the court ordered you to have a
7 video camera in your taxi, correct?

8 A Correct.

9 Q Based upon a prior incident?

10 A Excuse me?

11 Q That's based upon a prior incident?

12 A Correct. That is when judge ordered me to
13 say that, just put video. Not just cutting off, do
14 your video to record everything in cab, because
15 that's the only way you can protect just not
16 yourself. I can show you the judge ordered not
17 just yourself, but the customer too, at the same
18 time, for it not to happen again, because they are
19 going to accuse you for some reason. They told me
20 exactly, the judge. I don't know the judge's name,
21 but he say, Mr. Dhimo -- like the judge say now --
22 your accent, you could be -- you could be targeted
23 for any accusation. You can be number one because
24 your accent, your name, everything. That is just
25 what it was, that I did that not just protecting

1 me, but the customer at the same time. That is
2 what they ordered. We have an order for that. We
3 have the court order. You can see that, whoever
4 that judge was.

5 MS. MARTO: No further questions.

6 THE COURT: Anything further, Mr. Geel?

7 MR. GEEL: No, sir.

8 THE COURT: Thank you so much for being here.
9 You may step down.

10 THE WITNESS: Thank you, sir. God bless you.

11 THE COURT: Thank you.

12 Yes, sir.

13 MR. GEEL: We have no further evidence at
14 this time.

15 THE COURT: Ms. Marto.

16 MS. MARTO: We would call John Long to the
17 stand, please.

18 THE COURT: Okay.

19 (JOHN LONG, having been duly sworn,
20 testified as follows:)

21 THE WITNESS: John Long.

22 **DIRECT EXAMINATION**

23 **BY MS. MARTO::**

24 **Q** Good morning, sir.

25 **A** Good morning.

1 **Q** You represented Mr. Dhimo in his underlying
2 criminal matter?

3 **A** Yes.

4 **Q** Do you, roughly, recall when you took over
5 that case?

6 **A** No, I don't. As Mr. Dhimo said, it was while
7 he was still incarcerated, but we did meet two,
8 three times while he was incarcerated at J. Reuben
9 Long Detention Center, but then he was released
10 shortly thereafter, and we had several meetings in
11 my office after that.

12 **Q** So, roughly, how many meetings did you have;
13 do you know?

14 **A** He would come by, I would say -- in
15 preparation for this case, we felt it was
16 inevitably going to be a trial, so I was
17 continuously working on it. He would come
18 biweekly. Biweekly. As a taxi driver, he was
19 always on the road, so he would call me and say I'm
20 nearby, can I drop in. So we were -- I mean 20, 30
21 times, at least, prior to trial.

22 **Q** And what did you all discuss during those
23 meetings, just briefly?

24 **A** Briefly, I mean, every piece of the evidence.
25 As Mr. Dhimo said, there were three main videos

1 that were -- it is rare to have so much video in a
2 case, and so we spent a lot of time reviewing the
3 videos, in-car video.

4 Then the police body cam video, and then, of
5 course, his interview subsequent to arrest. But we
6 talked about every aspect of the case. I mean, the
7 victim's passing, trial strategy. From the very
8 beginning, we talked about whether or not he would
9 testify at trial. It was part of our discussion.
10 So this case was -- it never sat on the shelf. We
11 were continuously working it, along with Mr. Dhimo.

12 Q So you reviewed the videos with Mr. Dhimo?

13 A Numerous times.

14 Q Did you see anything in those videos that led
15 you to believe that they were tampered with?

16 A No. Matter of fact, the in-car video that
17 was in Mr. Dhimo's taxi, there was a video of
18 Myrtle Beach Police Department retrieving that
19 video from his car, from beginning to end. Also,
20 playing the video from beginning to end.

21 Then the body cam, it was from the time that
22 the police officers arrived on scene to -- if I'm
23 not -- it stopped after -- I don't know exactly,
24 maybe 20 minutes. I'm not sure. It might have
25 been at the time of the arrest. But there was no

1 indication that any of the videos were edited. It
2 never -- I never considered that a concern.

3 Q You stated you discussed the decision to
4 testify with Mr. Dhimo, right?

5 A Yes. It was not due to his immigration
6 status. It was not due to the victim being white.
7 It was not due to the victim being from South
8 Carolina. It was all in his -- well, there were
9 numerous, numerous reasons why a defendant -- it's
10 probably not a good idea to testify at trial. But
11 as we saw this morning, primarily Mr. Dhimo's
12 ability to make his thoughts known in English are
13 challenging. I believe -- it was always a concern
14 of mine that his communication -- the way he
15 communicates, and nothing against him, but it is in
16 an aggressive nature and he doesn't answer
17 questions shortly. So it is -- I always made it
18 well known to him that I never thought it would be
19 a good idea for him to testify at trial.

20 Q And so what was the narrative presented at
21 trial about the case, just briefly?

22 A That the -- Mr. Dhimo and the victim, that it
23 was a consensual relationship.

24 Q What was the State's theory at trial?

25 A That Mr. Dhimo purposefully -- he saw the

1 victim walking beside the road -- again, these are
2 not my words, I believe this is summarizing for the
3 State -- that he identified the victim as
4 vulnerable, and then they proceeded to a bar where
5 they both got highly intoxicated. The State
6 believed that she was more intoxicated than
7 Mr. Dhimo. Then he took her against her will to a
8 dimly lit place, unpopulated, being the beach, and
9 then took advantage of her.

10 Q So was there testimony brought out about her
11 intoxicated nature at the time?

12 A Absolutely, yeah. There was testimony and
13 direct evidence with video, and also testimony of
14 witnesses.

15 Q Do you recall an expert witness testifying
16 concerning retrograde alcohol extrapolation?

17 A Yes.

18 Q Is there any reason why you elected not to
19 object?

20 A Well, I just received this amended PCR
21 application this morning, so it is the first time I
22 became aware that this would be an issue, so I
23 don't want to speculate too much. But in reading
24 -- I do -- I do know that in reading the transcript
25 this morning, it jogged my memory that I did not

1 want to spend a lot of time cross examining an
2 expert witness when we had evidence that was found
3 on Page 319 through 322. I cross examined the
4 detective who handled the case, that dealt with her
5 immediately after and then a few hours after. She
6 was -- she was arrested for intoxication. So I
7 felt like it was better not to cross examine the
8 expert witness and object to the point -- to put a
9 spotlight on the number that was assigned to her
10 level of intoxication, but it was best to rely on
11 the detectives to say -- and I was able to get
12 testimony from them -- to say that she was able to
13 communicate with them, and that she understood her
14 rights, and that she was not an obliterated drunk
15 as the number that was extrapolated would have
16 indicated.

17 So I felt like the trial strategy was to
18 focus on actual witness testimony rather than
19 numbers on a page.

20 Q And this expert wasn't the only person that
21 brought out her intoxication, right?

22 A Correct. It was the main part of the trial.

23 Q Do you recall the State in any way
24 highlighting Mr. Dhimo's decision to remain silent?

25 A Yes.

1 Q Do you recall whether or not you objected to
2 that?

3 A I did object to that. On Page 281 of the
4 transcript, if I could refer to that?

5 (A brief pause in the proceedings.)

6 A Do you want me to point that out?

7 Q Yes, sir.

8 A Bottom of 280, Line 23: "Is that the point
9 that you decide to end your part of the interview,
10 correct?

11 Answer: Yes, ma'am.

12 Mr. Long: I" --

13 Then the Court said: "Do you have a matter,
14 Mr. Long?

15 I said -- I replied: "I object to that,
16 Your Honor."

17 Knowing where that was going, I objected.

18 Then, in the in-camera hearing, we addressed
19 that. So I would say I did object to that topic.

20 As the defendant pointed out in his
21 application, the Court pulled out that information
22 from the prosecutor that he was invoking his Fifth
23 Amendment right, and that the Court will allow it.

24 Q I don't want to put words in your mouth, but
25 were you under the impression that the issue had

1 been resolved at that point?

2 **A** Yes.

3 MS. MARTO: One moment. Nothing further.

4 **CROSS EXAMINATION**

5 **BY MR. GEEL:**

6 **Q** Just let me know if you can't hear me.

7 **A** I can hear you fine.

8 **Q** Okay. Great.

9 Let me jump back about the retrograde alcohol
10 extrapolation. On Pages 216 to 218 of the
11 transcript, you just testified that your rationale
12 is that you didn't want to put a spotlight on the
13 number. I take that to mean that you didn't want
14 to highlight what her actual blood alcohol content
15 was, or what did you mean by that?

16 **A** Again, just -- you know, a little while ago I
17 got notice of this, so putting it together -- I
18 don't want to speculate with you, but reading
19 through the transcript, if I had to give an opinion
20 based on what I read through the transcript this
21 morning, correct, I would not want to put a
22 spotlight on the level of intoxication that the
23 expert put on her.

24 **Q** Okay. Would you agree, though, that if you
25 -- if testimony was objected to and then excluded,

1 that the jury wouldn't have heard that number at
2 all; you would agree?

3 A If that were the case, yes.

4 Q And that would be preferable to simply not
5 bring a spotlight on it; you would agree?

6 A No, I wouldn't agree on that.

7 Q So if there is evidence that you don't want
8 to highlight for the jury, you would not prefer for
9 it to simply not be admitted at trial?

10 A Wait. Restate your question.

11 Q You said you didn't want to put a spotlight
12 on the number of the blood alcohol content as a
13 number, correct?

14 A Correct.

15 Q If you had the opportunity to have that
16 number completely excluded from trial, that would
17 be preferable, correct?

18 A Correct.

19 Q Okay. So if you had a basis for objecting
20 and completely keeping that testimony out, that
21 strategically would be a good thing to do; you
22 would agree?

23 A Correct.

24 Q Okay. So, now getting to the retrograde
25 alcohol issue, if you had a basis for preventing

1 that witness from testifying about retrograde
2 alcohol extrapolation completely, that is better
3 than simply not highlighting it with an objection?

4 **A** If there was a basis for that, correct.

5 **Q** Right. Right. So we are on the same page
6 there.

7 So on Page 216, you did initially object. Do
8 you recall that? I know you just had a chance to
9 look at the transcript. On Page 216 at Line 15 and
10 16, you said: "Your Honor, I would object to any
11 testimony as to retrograde extrapolation," and then
12 there was a bench conference, but we don't know
13 what was discussed there. Do you have any
14 independent recollection?

15 **A** That is the first time -- again, that is -- I
16 didn't see that Line 15, again. So I did object to
17 it.

18 **Q** Well, you objected -- you said you had an
19 objection, and then there was a bench conference,
20 and the testimony proceeded without any resolution
21 to the objection?

22 **A** But the amended PCR application is failure to
23 object about retrograde extrapolation, and that
24 clearly says: "Your Honor, I object to any
25 testimony regarding retrograde extrapolation."

1 Q Right. But you are aware you have to secure
2 a ruling on an objection for it to be preserved for
3 review?

4 A I can't recall what happened at that bench
5 conference.

6 Q So we'll agree there is no ruling of the
7 objection, because there is a bench conference, and
8 then the testimony proceeds?

9 A I'll agree to that. But that is not what you
10 wrote in the application. It says: "Failure to
11 object." Clearly, I did object.

12 Q Well, I'll worry about that with the Judge.
13 There is no ruling on the objection here in
14 the transcript?

15 A Not in the transcript.

16 Q And then later on in -- Page 217, the witness
17 then goes on to offer their opinion on Line 9:
18 "Can you form an opinion as to what her blood
19 alcohol concentration would have been at that
20 point, 11 hours earlier?" "Her" being the alleged
21 victim in this case, correct?

22 A Correct.

23 Q And then on the following page, Page 218,
24 Lines 8 through 19, the question is: "To the point
25 169 being the blood alcohol content, there would be

1 about a .33, doing the math on the run?

2 Answer: Thereabouts, yes."

3 So the witness is speculating that the
4 victim's blood alcohol content was about .33 at the
5 time of the incident?

6 A Correct.

7 Q And, of course, I mean, this is just based on
8 this retrograde extrapolation; is that consistent
9 with your recollection of the testimony?

10 A Yes.

11 Q So it wasn't based on testing, just on the
12 math, essentially counting backwards?

13 A You will have to ask her that.

14 Q So, again this is testimony -- you didn't
15 want to put a spotlight on that particular fact,
16 that this witness believed it was .33 blood alcohol
17 content?

18 A Again, based on last minute notification,
19 that would be to the best of my recollection.

20 Q Moving on to a second enumeration, the
21 failure to object to opinion testimony. I'll ask
22 you to jump to Page 316, Line 20, the question --
23 and this is the testimony of Hugh Jones. Do you
24 recall who Hugh Jones was?

25 A No, I'm sorry.

1 **Q** Law enforcement -- do you recall whether he
2 was law enforcement or not?

3 **A** Let me look. (Witness examines document.)

4 (A brief pause in the proceedings.)

5 **A** I believe he was Myrtle Beach Police
6 Department.

7 **Q** Line 20, the question is: "What was -- well,
8 what was the purpose of reviewing both the
9 defendant's statement and the dash cam video? What
10 were you hoping to learn?"

11 The answer: "Possibly inconsistencies in his
12 story and what actually happened.

13 Question: Did you find any
14 inconsistencies?"

15 Top of Page 317.

16 Answer: "Yes, ma'am. There were. The
17 first thing, I believe he advised they were picked
18 up around 44th Avenue North, it was actually the
19 13th, it appeared to be 13th Avenue North. Then
20 they went to Jimmigans, which he completely left
21 out. He advised that the fare was turned on, which
22 we could find no evidence that the fare was turned
23 on. Let's see. He advised that he basically was
24 taking her straight home."

25 And at that point, you said: "Objection."

1 The Court asks what your grounds are, and
2 you say: "He's speculating."

3 So taking a broader view on this, there is
4 an objection there saying the witness is
5 speculating. Do you have an opinion now as to
6 whether there was another basis for objecting to
7 that particular line of testimony as far as
8 comparing Mr. Dhimo's statements with the other
9 evidence in the case?

10 **A** No.

11 **Q** You don't have an opinion in that regard?

12 **A** I can't recall, honestly.

13 **Q** Do you have an opinion as to whether it is
14 appropriate for a witness to testify about
15 inconsistencies between evidence, or to offer their
16 opinion in that regard?

17 **A** Can you narrow it down a little bit?

18 **Q** If a witness is saying -- talking about
19 inconsistencies between pieces of evidence, that
20 witness, you would agree, is offering their opinion
21 about what the evidence shows; you would agree?

22 If they are showing pieces of evidence and --

23 **A** Correct.

24 **Q** That is their opinion, correct?

25 **A** Correct.

1 Q And that is what the witness is being asked
2 to do here when asked what are the inconsistencies?
3 The witness is being asked to talk about, in his
4 opinion, what the inconsistencies are with the
5 evidence in the case?

6 A And that is why I objected.

7 Q Your objection said he's speculating. Do you
8 think speculation and offering one's opinion are
9 the same thing?

10 A Could be.

11 Q Okay. So when you said, Objection, he's
12 speculating, what you meant is that he's offering
13 his personal opinion about the case?

14 A Speculating as to his opinion.

15 Q So those concepts are one in the same,
16 speculating versus offering your opinion?

17 A Again, you know, looking back at this, I
18 mean -- I mean, I can't look back that far and give
19 you a definitive answer as to what I was thinking
20 at that time.

21 Q As you sit here today, do you have an opinion
22 whether this testimony was inappropriate to the
23 extent that it is the witness offering his opinion
24 about the case?

25 A That is why I objected. I objected.

1 **Q** I'm not asking about the thought process now,
2 I'm saying now as I point it out to you, the basis
3 for the objection, do you believe it would be a
4 proper basis to object to say that he's offering
5 his opinion about the case?

6 **A** That would be one opportunity to object.

7 **Q** Okay. And as you sit here today -- I don't
8 want to put words, but it seems as though you are
9 saying you didn't object on those grounds --

10 **A** No. No. That's not true. That is not what
11 I'm saying at all.

12 **Q** Do you have an opinion now as -- do you have
13 any independent recollection on why you would not
14 have objected, objected on those grounds?

15 **A** No. I mean, I don't know.

16 **Q** So there is not a strategic basis that you
17 can think of?

18 **A** The objection was that he's speculating as to
19 his opinion.

20 **Q** You said he's speculating. So what you meant
21 by that is that he's speculating to his opinion?
22 That is what you meant when you said he's
23 speculating?

24 **A** Yeah, I mean....

25 **Q** Okay. And then moving down to Line 16, the

1 question is: "Did you notice any inconsistencies
2 based on your review of the dash cam video and the
3 defendant's statement as to the route he took to
4 carry the customer home?

5 Answer: Yes, ma'am. The way I understood
6 it from his interview was he went straight home,
7 which there were several stops on the way.

8 Question: In fact, did the defendant ever
9 make -- take Ms. JK home?

10 Answer: No. She was found passed out on
11 the beach."

12 Again, you would agree that the witness is
13 offering his opinion about the inconsistency about
14 Mr. Dhimo's statement and the evidence at trial?

15 A Yes.

16 Q And there is no objection there, correct?

17 A Correct.

18 Q As you sit here today, can you identify a
19 strategic reason for not objecting to that piece of
20 testimony?

21 A Anything would be speculation.

22 Q Sorry?

23 A I don't recall.

24 Q So you don't have a strategic basis for not
25 objecting to the second piece I just read?

1 **A** I thought it would be proper at the time of
2 trial, but I don't want to speculate today.

3 **Q** The last one on this claim is on Page 319,
4 and I'll ask you the same question again, Line 5:
5 "Based on your review of the dash cam video, your
6 review of the defendant's statements, and your
7 review of those photos, did you notice any other
8 inconsistencies?

9 Answer: Yes, ma'am. At one part of the
10 video you can see him hold his arm up to the left
11 with Ms. JK in the cab. There appears to be nothing
12 in his arm, no injuries, no anything else that were
13 apparent in the photographs after this."

14 I mean, I won't belabor it, but same
15 question: Did you consider objecting to that on the
16 basis he was asking his opinion about the case?

17 **A** I thought it would be proper at the time of
18 trial, and anything today would be speculation.

19 **Q** Turning to the last issue, the comment on the
20 defendant's indication of right to remain silent,
21 could you turn to Page 280, please, Line 17. The
22 question is: "And so you asked him where he got
23 those marks. What did he say to you?

24 Answer: Not from her.

25 Question: Did you ask him again?

1 Answer: I believe I asked him three times,
2 and he gave me the same answer -- all three times,
3 'not from her.'

4 Question: And that -- it's at that point
5 that you decided to end your part of the interview,
6 correct?

7 Answer: Yes, ma'am."

8 At then at the top of 381, that's where you
9 objected to the testimony you just heard, correct?
10 And I think you went over this on direct. So
11 turning down to Page 281, Line 10, you argue to the
12 Court that that is a misstatement of facts.

13 Detective Allen did not choose to end the interview
14 at that time, Alqi Dhimo asked for an attorney.

15 So you were concerned that the State was
16 misrepresenting who actually ended the interview; is
17 that correct?

18 **A** It appears, uh-huh. Based on the reading of
19 the transcript today.

20 **Q** As a general practice, do you -- when you
21 have a client giving an interview and invoking
22 their right to an attorney, do you normally
23 endeavor to keep that away from the jury, the fact
24 that they invoked their right to remain silent?

25 **A** I never remember having that issue in another

1 case.

2 Q Okay. So it is not something that you deal
3 with on any regularity; is that fair to say?

4 A That would be fair to say.

5 Q On Page 282, Line 3, as you are discussing
6 it, and it is a lengthy colloquy on what happened,
7 the Court says on Line 3: "All right. There is
8 nothing wrong with saying that at that point in
9 time the defendant asked for an attorney and I was
10 obligated to stop interviewing, if that is what
11 occurred."

12 The prosecutor responds: "Okay."

13 What I intended to ask you is whether you had
14 an opinion whether that is objectionable? Do you
15 have an opinion as to whether that is
16 objectionable, whether there is a basis for saying
17 to the Court that that should not have been
18 introduced to the jury?

19 A Again, if I thought it would be proper at the
20 time of the trial, but today it is speculation.

21 Q So you don't have an opinion today as to
22 whether it is objectionable?

23 A I won't speculate.

24 Q Line 283, Line 8, Ms. Walter says: "I'm
25 happy to say that the defendant asked for an

1 attorney. In my 24 years of practice, I have never
2 been able to say that in open court."

3 And the Court says: "Well, I'm going to
4 allow that. Do you have an objection to that,
5 Mr. Long?"

6 And you said: "No, Your Honor. That's what
7 happened."

8 Again, I know this trial was a long time ago,
9 but when the prosecutor said that in her 24 years
10 she's never been able to make reference to a
11 defendant invoking his right in open court, did
12 that give you pause or --

13 A I don't recall.

14 Q You don't recall?

15 As you sit here today, does this remark give
16 you pause, that a prosecutor in her 24 years of
17 practice has never made reference to someone
18 invoking their right to remain silent during trial?

19 A I don't recall the context of that comment,
20 so I don't want to speculate.

21 MR. GEEL: Thank you.

22 THE COURT: Ms. Marto.

23

24

25

REDIRECT EXAMINATION

BY MS. MARTO:

Q Sitting here today, when it comes to objecting to the inconsistencies in the applicant's statement, do you think an objection on a different ground would have been more successful?

A No.

Q Again, you thought when it came to dealing with the right to remain silent, you thought that issue was already dealt with in your first objection, right?

A Correct.

Q Do you think an objection to the expert witness would have been successful?

A No.

Q You objected once, correct?

A That's correct.

Q So an additional objection, do you think that would have made a difference?

A No.

MS. MARTO: Nothing further.

RECROSS EXAMINATION

BY MR. GEEL:

Q When you say you don't think an objection would be successful, you are speculating, correct?

1 **A** Correct.

2 **Q** You don't know what the judge would have
3 ruled, correct?

4 **A** Obviously.

5 **Q** So if the law happens to go the other way
6 and, you know, you knew that for sure, you might
7 have a different opinion; if there was case law
8 that would back up the objection, for example?

9 **A** Generally speaking.

10 **Q** Generally speaking, yes, you might have a
11 different opinion on that question, correct?

12 **A** Depending on the facts and circumstances,
13 yes.

14 **Q** Sure.

15 MR. GEEL: Thank you.

16 THE COURT: Thank you, Mr. Long.

17 Any objection to him being relieved?

18 MS. MARTO: No objection.

19 State calls Mary Ellen Walter to the stand.

20 (MARY ELLEN WALTER, having been duly sworn,
21 testified as follows:)

22 **DIRECT EXAMINATION**

23 **BY MS. MARTO:**

24 **Q** Good morning. You prosecuted this case,
25 right?

1 **A** Yes, I did.

2 **Q** Did you have this case from the inception?

3 **A** I don't believe I did. Sorry, I wasn't
4 prepared for this hearing. I'm prepared for a
5 different hearing. I don't think I did, because I
6 think I took it after I was admitted into practice
7 in South Carolina.

8 **Q** Did you review the discovery in this case?

9 **A** Yes. Absolutely.

10 **Q** Did you see anything with the videos
11 indicating that they were tampered with or
12 otherwise cut?

13 **A** When they were turned over to the defense,
14 no. When we had them, no. We redacted some of
15 them for trial, but the original videos, no.

16 **Q** You have an open file policy, for the most
17 part?

18 **A** I disclose everything that I'm required to
19 disclose. If there is a request that I believe is
20 appropriate, I will disclose that as well. But,
21 no, I do not let defense attorneys rummage through
22 my files.

23 **Q** Do you recall using an expert witness
24 concerning retrograde alcohol extrapolation?

25 **A** Yes, I do.

1 Q Have you used an expert in that field before?

2 A I have.

3 Q And has there ever been a ruling, to the best
4 of your knowledge, stating that that is
5 impermissible?

6 A In all fairness, this is my third
7 jurisdiction that I've practiced in, and I believe
8 that when I used it before, it was in one of the
9 other jurisdictions. I'm not aware of any case law
10 or ruling that would say that it is impermissible.

11 Q Do you recall back and forth at trial about
12 the right to remain silent?

13 A I do.

14 Q Do you recall whether or not there was a
15 discussion with the Court outside of the presence
16 of the jury about that issue?

17 A I do.

18 Q Did you think that raising that issue was
19 impermissible at that point?

20 A I did. And Mr. Long and I had specifically
21 agreed to end the recording of the video prior to
22 Mr. Dhimo invoking his right to counsel.

23 Q Is that what happened at trial?

24 A My brief review of the transcript this
25 morning is that the issue was raised by the Court

1 -- well, first by Mr. Long, and then by the Court,
2 during Detective Allen's testimony where -- the way
3 I phrased the question is: Is that the point at
4 which you ended the interview or chose to end the
5 interview. In my mind, it was so that I wasn't
6 saying, So that is when he invoked his right to
7 counsel.

8 Q So you thought that phrase was permissible?

9 A Yes. Because, in fact, she ended the
10 interview on her own volition because he invoked
11 his right to counsel.

12 MS. MARTO: Nothing further, Your Honor.

13 **CROSS EXAMINATION**

14 **BY MR. GEEL:**

15 Q Ms. Walter.

16 A Yes.

17 Q So as to the -- you testified you used
18 retrograde alcohol extrapolation testimony in this
19 previously, but not sure if it was in this
20 jurisdiction OR possibly elsewhere?

21 A Correct. I know we used it regularly in
22 Pennsylvania.

23 Q I know you are sort of speaking off-the-cuff,
24 but you said you weren't aware of case law which
25 makes that testimony impermissible?

1 **A** Correct.

2 **Q** The standard is the other way, correct? The
3 prosecution has to demonstrate the validity of
4 expert testimony and they have to demonstrate it is
5 admissible?

6 **A** Right, and we did.

7 **Q** Right. In Daubert and evaluating expert
8 testimony --

9 **A** I don't think we followed Daubert here.

10 **Q** Evaluating expert testimony for its validity
11 under the Rules of Evidence, I mean the prosecution
12 has to demonstrate it is permissible and not the
13 other way around?

14 **A** Right, and we did demonstrate it was
15 admissible.

16 **Q** Fair enough.

17 As to the indication of the issue regarding
18 his right to counsel, this was redacted from the
19 video prior to the trial. Was the portion -- to be
20 clear, the portion redacted where he invoked his
21 right to counsel, that was redacted from the video?

22 **A** Yes. I'm not sure -- I don't remember if
23 there were other redactions, but we typically go
24 through a defendant's statement to ensure that we
25 are not violating any rules of evidence or

1 mentioning his implication of the right to counsel.
2 So I believe we stopped it at the point where
3 Detective Allen -- right before she was asking
4 those questions.

5 Q Right. And redacting that portion of the
6 video, or at least not making reference to someone
7 invoking their right to counsel, in your practice
8 as a prosecutor, that is a pretty typical thing
9 that would take place during trial, avoiding that
10 particular subject?

11 A Correct.

12 Q And I think you said in 24 years you never
13 mentioned that in open court?

14 A In 29 years of practice, that is the only
15 time I have ever mentioned it in court.

16 Q So as we're here, this is the only time you
17 ever mentioned a defendant invoking his right to
18 counsel during his jury trial?

19 A Under a judge's order, yes.

20 Q And I know it's been awhile since the trial
21 took place, but were you surprised that the judge
22 said you could make reference to it?

23 A I don't know if "surprised" is the right
24 word. I did not necessarily agree with his ruling,
25 but he was the judge, and I view him as the judge

1 of the law, which is what he is, so I followed his
2 direction.

3 Q But, again, that would have been, sort of,
4 inconsistent with your practice for the prior 24 --
5 and now 29 years -- correct?

6 A There is a lot about our trials that are
7 inconsistent with my 29 years of practice.

8 Q Fair enough.

9 MS. MARTO: No further questions.

10 THE COURT: Ms. Walter, thank you for being
11 here. You are welcome to step down.

12 MS. MARTO: No further witnesses, Your Honor.

13 Mr. Geel, I'll hear from you in closing, or
14 however you would like to do it.

15 MR. GEEL: Just very briefly. As to the
16 retrograde alcohol issue, what we have here is,
17 essentially, counsel saying he didn't want to put a
18 spotlight on a number. There was not a strategic
19 basis for not maintaining his objection -- or he
20 said he didn't want to highlight it.

21 We submit -- and, again, I mean, this hinges
22 whether that testimony was admissible, but we
23 submit it was improper to testify specifically
24 about this victim's blood alcohol content at the
25 time of the attack. It may have been a closer call

1 if the witness was talking about simply how fast
2 alcohol tends to be eliminated from a person's
3 system.

4 We submit that where we think this crosses
5 the line is, essentially, the testimony that takes
6 place on Page, I believe, 218 -- yeah, 218 of the
7 trial transcript. The witness talks specifically
8 about the victim herself. This wasn't like this is
9 how fast alcohol goes through the system. This
10 witness says specifically that this victim's blood
11 alcohol content was .33 during the alleged attack.

12 And then, further, that, you know, going into
13 detail saying you are getting someone who lost all
14 motor function, most likely unconscious and asleep,
15 you start getting into respiratory depression, and
16 it's actually possible to die from consuming that
17 much alcohol.

18 So we submit it is improper for the witness
19 to have focused in on the victim's intoxication
20 level because, again, that is purely speculative.
21 That was very objectionable, we submit.

22 Of course trial counsel did object, posed an
23 objection, and there was a bench conference, but
24 then the objection was not maintained and there was
25 no ruling, so that issues was not reserved for

1 review. Every lawyer that does trial practice
2 knows that you have to get a ruling on an objection
3 for it to actually be reviewable on appeal, so it
4 is essentially waived and as though he did not
5 object at all.

6 As to the opinion testimony. Again, I won't
7 belabor that one. The witness was testifying --
8 and we have the transcripts in our amendment -- the
9 witness was repeatedly comparing Mr. Dhimo's
10 statement to other evidence at trial. That is
11 opinion testimony, and we submit that it is
12 improper for him to do so. He is essentially
13 offering his opinion that Mr. Dhimo is not telling
14 the truth because it was inconsistent with other
15 evidence, and that is not proper for a witness to
16 do that, certainly not a law enforcement witness.

17 Lastly, failing to object to the
18 prosecution's comment on defendant's implication on
19 his right to remain silent. It is a fairly
20 straightforward issue. I share the prosecutor's,
21 at least, commentary that this is highly unusual
22 thing to take place in a court of law. I haven't
23 been trying cases as long as she has, but in the 13
24 years I've been trying cases, my understanding is
25 that the rules -- you absolutely have to stay away

1 from that. An indication to right to counsel is
2 not to go in front of the jury, and not only did it
3 go in front of the jury here, but it was
4 actually -- the implication was that Mr. Dhimo
5 invoked his right to counsel because he was being
6 uncooperative, and that is the implication that is
7 prohibited to going to the jury.

8 Again, the Court told counsel he would allow
9 the prosecutor to do this, and without objection
10 from Mr. Long.

11 If you look at the transcript, Mr. Long was
12 sort of insisting that the prosecutor did this. He
13 was concerned that the prosecutor had elicited
14 untrue testimony, and so Mr. Long acquiesced with
15 the Court's decision and, in fact, kind of made
16 this happen. He sort of insisted that the
17 prosecution comment on his client's right to remain
18 silent, which is, again, completely improper.

19 So on those grounds, Your Honor, we submit on
20 all three that trial counsel was Constitutionally
21 ineffective, and Mr. Dhimo was prejudiced. So we
22 ask the Court to grant the application and grant
23 Mr. Dhimo a new trial.

24 Thank you.

25 THE COURT: All right.

1 Ms. Marto, is there anything?

2 MS. MARTO: Yes, Your Honor, briefly.

3 Concerning the allegations that counsel didn't
4 discuss right to testify, I think Mr. Long and the
5 State's position is -- he credibly testified that
6 he didn't think that Mr. Dhimo would be able to
7 represent well to the jury, organize his thoughts,
8 and he would come across as argumentative. And so
9 because of that, it was discussed, and that was the
10 driving force behind him not to testify.

11 Concerning the video, I think the prosecutor
12 and counsel testified that there was no evidence of
13 tampering with these videos.

14 Concerning the expert witness, it was already
15 heavily established at trial that by the time the
16 witness took the stand, that she was very
17 intoxicated, I believe unconscious, when the police
18 found her, and she was arrested for intoxication in
19 public.

20 The closest case I was able to find
21 concerning this type of an expert is called
22 Hartfield versus Get Away Lounge and Grill, and it
23 is a dramshop case. But, basically, it said that
24 the chemical expert's retrograde extrapolation to
25 determine how many beers a patron had over how many

1 hours was not impermissibly speculative. So we ask
2 you to rely on that case in finding that the expert
3 witness was permissible. And even if Your Honor is
4 inclined to disagree with that, it was still
5 heavily evidenced that she was intoxicated at the
6 time. So this is mostly accumulative by nature.

7 Additionally, I think Mr. Long identified
8 that he objected to, I think, all three pieces of
9 -- three issues that the applicant brought up in
10 this case. The issue was a renewal or basis, but
11 it is the State's position that it wouldn't have
12 likely changed the results, and it wouldn't have
13 changed the results of the objection. It wouldn't
14 have been granted, but also it wouldn't have
15 changed the results at trial because, effectively,
16 what you have is an unconscious victim and a lot of
17 testimony about how heavily intoxicated she was at
18 the time.

19 So for these reasons we request you to deny
20 relief.

21 Thank you.

22 THE COURT: Thank you.

23 Mr. Geel, anything in response?

24 MR. GEEL: No, Your Honor.

25 THE COURT: All right. I'll certainly read

1 the trial transcript and take the matter under
2 advisement and let you know of my decision.

3 (Whereupon, the proceedings concluded.)

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 CERTIFICATE OF REPORTER

2 State of South Carolina)

3 County of Horry)

4

5 I, Natalie Dahl, Official Court Reporter for
6 the State of South Carolina, do hereby certify that
7 the foregoing is a true, accurate and complete

8 Transcript of Record of the proceedings had and
9 evidence introduced in the hearing of the captioned
10 case, relative to appeal, in the Court of Common
11 Pleas for Horry County, South Carolina, on the 30th
12 day of November, 2022.

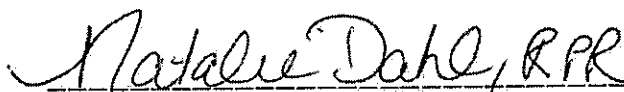
13 I do further certify that I am neither of
14 kin, counsel, nor interest to any party hereto.

15

16 April 18, 2023

17

18


Natalie Dahl, RPR

19

Court Reporter

20

21

22

23

24

25

1 CERTIFICATE OF REPORTER

2 State of South Carolina)

3 County of Horry)

4
5 I, Natalie Dahl, Official Court Reporter for
6 the State of South Carolina, do hereby certify that
7 the foregoing is a true, accurate and complete
8 Transcript of Record of the proceedings had and
9 evidence introduced in the hearing of the captioned
10 case, relative to appeal, in the Court of Common
11 Pleas for Horry County, South Carolina, on the 30th
12 day of November, 2022.

13 I do further certify that I am neither of
14 kin, counsel, nor interest to any party hereto.

15
16 April 18, 2023

17 

18 Natalie Dahl, RPR

19 Court Reporter
20
21
22
23
24
25

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Alqi Dhimo,)
Applicant,)

Case No.: 2021-CP-26-01461

v.)

ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

RENEE N. ELYS
CLERK OF COURT
HORRY COUNTY

2023 MAR -9 P 1:11

FILED
HORRY COUNTY

This matter comes before this Court by way of Applicant's post-conviction relief application filed March 9, 2021. Respondent made its return on April 26, 2021, requesting an evidentiary hearing be convened. An evidentiary hearing was held on November 30, 2022, at the Horry County Courthouse. Christopher R. Geel, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel John Reuben Long, II, and Prosecutor Mary-Ellen Walter, Esquire, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant was indicted for attempted criminal sexual conduct, third degree (2015-GS-26-04000), indecent exposure (2015-GS-26-04001), and kidnapping (2015-GS-26-04002) by the Horry County Grand Jury at its September 2015 term. Applicant was represented by Attorney John Reuben Long, II, and Assistant Solicitors Mary-Ellen Walter and C. Leigh Andrew, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. The indictment for kidnapping was dismissed, *nolle prosequi*. Applicant proceeded to a jury trial on January 8, 2018, before the

Honorable Steven H. John, circuit court judge. The jury acquitted Applicant of indecent exposure but convicted him, as indicted, of attempted criminal sexual assault, third degree. Judge John sentenced him to eight years' imprisonment and required him to register as a sex offender.

Applicant filed a timely notice of appeal, and the appeal was perfected by Joanna Delaney, of the South Carolina Commission on Indigent Defense. Applicant raised the following issue on appeal:

1. Whether the trial court erred in refusing to grant appellant a directed verdict on the charge of attempted third degree criminal sexual conduct where it was undisputed the complainant was voluntarily engaging in foreplay with appellant prior to being found unconscious on the beach, where there was no direct evidence and no substantial circumstantial evidence that appellant attempted to commit an overt sex act on a physically helpless, mentally defective, or mentally incapacitated person?

The South Carolina Court of Appeals affirmed the conviction and dismissed the appeal. *State v. Dhimo*, Op. No. 2020-UP-031 (S.C. Ct. App., Filed February 5, 2020). Applicant filed a petition for writ of certiorari with the South Carolina Supreme Court, which was denied on November 25, 2020. The remittitur was sent on December 4, 2020.

Summary of Relevant Facts

On June 21, 2015, Victim and her boyfriend Justin Stephenson attended a barbecue at her mother's house. Upon departure, Victim was intoxicated. Victim and Stephenson got into an argument over smoking cigarettes inside the vehicle and loud music when Stephenson pulled into a gas station. Victim exited the vehicle and refused to return home with Stephenson. Victim texted Stephenson and informed him she would take a taxi. (Tr. 54-58).

Security guards Benjamin Thompson and Joyce Chestnut Dixon were on patrol nearby when they observed a taxi parked at the building with the engine running. Concerned, they began looking around the area to see if they could find the driver or someone associated with the taxi.

FILED
JERRY H. ELVIS
CLERK OF COURT
SPRING CREEK COUNTY, SC
2020 MAR -9 P 1:41

As they approached, they heard someone "hollering" at them to stop moving and stay away. Looking around, they saw a male figure wearing a dark-colored shirt and white underwear pulled down around his knees who jumped up. He was unclothed around his crotch area. They saw a human-shaped figure on the ground by Applicant. Thompson asked Applicant if "everything was okay," but did not receive a response. Instead, Applicant moved over towards a "white object" and started to get dressed. Thompson maintained visual contact with Applicant the entire time and contacted the police. (Tr. 109-27).

Officer Daniel Eddy was the first responding officer. When he arrived, he observed a taxi parked sideways in the beach access and spoke with security guards who confirmed they reported the man. He began walking down the beach to locate the reported man when he located Applicant standing up. He also found Victim, laying with her face down in the sand, almost as if she were in the fetal position. He noticed Victim's bathing suit bottom/underwear were pulled to the side, exposing her privates. When he tried to wake Victim, she was unresponsive. He called for backup and EMS while detaining Applicant. (Tr. 64-68).

After backup arrived, officers woke Victim up using smelling salts. She was heavily intoxicated, unable to walk by herself, and could not provide answers to basic questions such as her name or where she lived. She was placed inside the ambulance. While placing Applicant in his vehicle, Officer Eddy observed scratch marks behind his left shoulder and bite marks down his arm. Victim was visibly upset and crying. Later, in Applicant's cab, Officer Eddy found Victim's purse and cellular phone. (Tr. 68-74, 77-78).

Officer Zachary Cooper, the officer who used smelling salts to wake Victim, testified that, Victim also threw up. Her speech was slurred, and she was distraught. Emotional, Victim

constantly reiterated she just wanted to go home to her boyfriend. She had a powerful "odor of alcohol." (Tr. 89-108).

Officer David Bailey, a crime scene specialist, took photographs of Applicant after the crime, revealing bruising, scratches, and a bite mark on Applicant's left upper arm. (Tr. 256-66).

Officer Scott Williamson collected evidence from Applicant's taxi, including the dashboard camera.¹ He viewed the video recorded by the record and noted it shows: (1) Applicant turning off the camera soon after initialing picking up Victim; (2) Victim, intoxicated, flirting with Applicant and telling him she "loved [him]"; (3) Applicant requesting Victim that she "[l]et [him] love [her]"; (4) Victim passing out in the driver's seat of the cab and Applicant getting her out of the vehicle, at which time she told him to "stop it," "get away from me," and other statements. (Tr. 161-77).

Chad Morenus, a bar tender at Jimmagan's Pub in Myrtle Beach, was working that night when he saw Victim and Applicant at the bar. He served them three or four shots each (Tr. 132-40).

Emily Hennig-Ryan, a nurse with Grand Strand Medical Center, treated Victim when she was taken to the hospital. testified Victim consented to the use of the kit and she was prohibited to use rape kits on the victims of sexual assault without their consents. Jennifer Michelle Brown, a forensic toxicologist with SLED, tested blood samples obtained from Victim and concluded her blood alcohol concentration (BAC) was 0.169 percent at the time it was drawn, and would have been around 0.332 percent at the time of her assault. According to Brown, someone with such a significant BAC loses control of her motor functions, is usually unconscious and at risk for

¹ The dashboard camera was installed in Applicant's taxi cab as a condition of bond from a 2014 charge of first degree criminal sexual conduct. (Pretrial Tr.p. 20).

death. Catherine Leisy, a forensic scientist with SLED, analyzed Victim's fingernail scrapings. The partial DNA profile developed from the major contributor to the mixture under Victim's right fingernails matched Applicant. (Tr. 194-219, 240-51).

Detective Carol Allen interviewed Victim and Applicant after they were taken to the police station. Victim was loud, screaming, crying, and not in "any shape to be interviewed at that time." Applicant did not appear to be intoxicated and could answer all her questions. He did not inform Detective Allen that he and Victim stopped by Jimmagan's Pub or that his interaction with Victim transitioned from a cab ride to a date. He eventually admitted Victim was "completely passed out and would not wake up." (Tr. 270-301).

Detective Hugh Jones reviewed the dash cam video of Applicant's cab. Applicant picked up Victim and had a brief conversation before the video stopped. The recording resumed approximately thirty minutes later when the two left Jimmagan's. Applicant chose to drive around rather than take Victim directly home. After a second stop, Victim enters the driver's seat and begins driving towards her home but ended up stopping at the beach access where the cab was found. Detective Jones observed Applicant never activated the fare meter. Victim was unable to recall anything after the stop at Jimmagan's. (Tr. 304-28).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. Yes, my lawyers not represent [illegible] all fact and trial judges not fair.
 - a. All my video not represent. The lawyers not represent all fact. Not fair court trial.
 - b. The fact the victim never testified. Is dead because overdose. Dead after accused me overdose.
 - c. The fact victim never testified. The court never make [illegible] without [illegible]. Never proved the truth.

At the PCR hearing, Applicant proceeded forward on the allegations listed in his

FILED
 HORRY COUNTY
 2023 MAR -9 P 1:41
 REBECCAH N. ELVIS
 CLERK OF COURT
 Horry County, SC.

amended application, filed November 30, 2022:

1. Ineffective assistance of counsel:

- a. For failure to object to improper expert testimony about retrograde alcohol extrapolation and speculation about the victim's level of intoxication.
- b. For failure to object to opinion testimony from the State's witness regarding the defendant's statement's consistency/inconsistency with the other evidence in the case.
- c. Failure to object to the prosecution's initial comment on defendant's invocation of his right to remain silent, and acquiescing to the Court's instruction that the State was permitted to do so.

Applicant also proceeded forward on the following:

1. Prosecutorial misconduct because the taxi and body camera video footage was tampered with.
2. Ineffective assistance of counsel for erroneously telling him not to testify at trial.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

Applicant stated that he was represented by Counsel for about two, two-and-a-half years. He stated he hired Counsel because he was not happy with his prior lawyer. He stated he trusted Counsel. He stated that he met with Counsel at the jail two or three times. He stated that the entire video footage was not presented at trial. He stated he was the victim. He stated that the State tampered with video footage. He stated that he discussed the right to testify with Counsel, but Counsel told him not to because he was Indian, and the victim was white. He stated that the woman lied, and he was only trying to help the girl. He stated that he had video surveillance in the cab because of a prior court order.

FILED
HORRY COUNTY
2023 MAR -9 P 1:41
JEE N. ELYS
CLERK OF COURT
HORRY COUNTY, SC

Counsel Testimony

Counsel stated that he represented Applicant for a long time and met with him between twenty and thirty times. He stated that he thought Applicant was heated and argumentative and did not organize his thoughts well, which is why he encouraged him not to testify. He stated that the fact that the victim was highly intoxicated was established and he did not want to spotlight the BAC number. He stated that this was the reason why he did not object to mention of her intoxication. He stated that he should have objected to retrograde extrapolation if it was not admissible and that he did object at one point. He stated that he did not think the officer addressing Applicant's inconsistent statements was objectionable because he was just offering his opinions. He stated he objected for speculating, but not based on him offering his opinion. He stated that he does not deal with the State commenting on Applicant remaining silent often, but that he objected when the State did so.

Prosecutor Testimony

Prosecutor testified that the videos were not tampered with. She stated she used expert witnesses in alcohol extrapolation before but was unsure if it was in South Carolina. She stated that it was deemed admissible when she did it before. She stated there was a video redaction regarding Applicant's right to remain silent. She stated this was the only time in nearly thirty years or practice where she mentioned Applicant's decision to remain silent, but she thought she was able to mention it because of the Judge's directive.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are the Horry County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial

FILED
HORRY COUNTY
CLERK OF COURT
RENEE N. ELVIS
MAR -9 PM 4:41
HORRY COUNTY, SC

transcript, direct appeal records, and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of

FILED
JERRY COOPER
MAR -9 P 41
RENEE N. ELY
CLERK OF COURT
JERRY COOPER
SC

representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."

Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability" is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Retrograde Alcohol Extrapolation

Applicant alleges Counsel was ineffective for failing to object to testimony concerning retrograde alcohol extrapolation. Whether failure to object constitutes deficient performance

generally hinges on whether or not a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where “counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel”).

The record reflects Counsel objected to this testimony and a bench conference occurred thereafter. (Tr. 216). Additionally, Respondent cited some authority, though loosely related, that established a recognition that an expert *can* testify concerning retrograde extrapolation at trial. *See Hartfield v. Getaway Lounge & Grill*, 388 S.C. 407, 697 S.E.2d 558 (2010) (finding that expert testimony concerning alcohol extrapolation is not impermissibly speculative). Further, Prosecutor credibly testified that she presented this type of testimony, and it was found admissible in other cases. Thus, this Court finds that an objection likely would not have been sustained and Applicant’s trial would not have been impacted based on the testimony of Counsel’s decision to or not to object. Accordingly, relief is denied.

FILED
Horry County
2023 MAR -9 PM 1:41
JENNIFER N. LEWIS
CLERK OF COURT
Horry County, SC

Opinion Testimony

Applicant claims Counsel was ineffective for failure to object to the officer’s opinion on Applicant’s consistent/inconsistent statements when held up to other evidence in the case. Counsel credibly testified that he thought this testimony was admissible. Regardless, this Court finds that these statements likely did not impact the outcome at trial. Accordingly, Applicant has failed to meet his burden of proof and relief is denied.

Right to Remain Silent

Applicant claims Counsel was ineffective for failure to object to the State’s comment on Applicant’s invocation on his right to remain silent and for acquiescing to the Court’s instruction

that the State could do so. This Court finds Counsel acted reasonably in the face of a difficult situation. Counsel initially objected to the State saying that the detective ended the interview because it was a false statement of fact. (Tr. 280-82). There was a conversation then held outside the presence of the jury. In that conversation, the Court told the State they could ask about Applicant electing to end the conversation. (Tr. 281-85). Though Counsel did not object, this Court finds that an objection likely would have been overruled and the State would have pursued the same line of questioning. Once the State asked about Applicant's lack of cooperation, Counsel objected again and another conversation was held outside the presence of the jury where, in part, the State was scolded by the judge regarding asking the question. (Tr. 301). Counsel then moved for a mistrial. (Tr. 302). The question was struck, and a curative instruction given to the jury, upon Counsel's request. (Tr. 302-03).

Amidst all of this, Counsel's behavior was reasonable. However, this Court is disinclined to find that, even if Counsel's behavior was different, the result at trial would have been different. Accordingly, relief is denied on this ground.

Telling Applicant not to Testify

Applicant claims Counsel was ineffective for telling Applicant not to testify at trial. "The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. However, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions." *Brown v. State*, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). "If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner during its deliberations." *Id.* "A defendant's decision to testify or not must be made with

FILED
HARRIS COUNTY
2023 MAR 29 P 1:42
JENNIFER ELVIS
CLERK OF COURT
HARRIS COUNTY, SC

knowledge of the consequences of either choice.” *Id.*

Counsel credibly testified that he was worried Applicant’s testimony at trial would be consistent with the testimony proffered at the PCR hearing. Specifically, he was worried it would not play to a jury because Applicant would be scattered and angry while testifying. He stated he thought this would not be helpful at trial. This Court agrees. Additionally, this Court finds that Applicant was engaged in a thorough colloquy about his right to testify. (Tr. 341-44). After this colloquy, Applicant elected not to testify. Thus, this Court finds Counsel’s advice reasonable, and that Applicant made the decision to forego testifying voluntarily and knowingly. Further, this Court declines to find prejudice, as the testimony likely would not have been helpful to the defense. Accordingly, relief is denied.

Prosecutorial Misconduct

Applicant claims prosecutorial misconduct for tampering with the videos. There was no evidence presented indicating any amount of fabrication. Additionally, Prosecutor credibly testified that she did not tamper with the evidence in any way and Counsel credibly testified that he did not see any indications in the evidence that it was tampered with. Accordingly, relief is denied on this ground.

Conclusion

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry’s written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991),

NOT

an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice.

AND IT IS SO ORDERED this 6th day of MARCH, 2023.

H. Steven DeBerry, IV
H. STEVEN DEBERRY, IV
Presiding Judge
Fifteenth Judicial Circuit

Florence, South Carolina.

FILED
HORRY COUNTY
2023 MAR -9 P 1:42
RENEE N. ELYS
CLERK OF COURT
HORRY COUNTY, SC

WITNESSES

H Jones Myrtle Beach Police Department

DOCKET NO. 2015-GS-26- 04000

The State of South Carolina

County of Horry

Martin D. Spratlin

15H02917

COURT OF GENERAL SESSIONS

SEPTEMBER, 2015 TERM

FILED
Horry County
2015 SEP 18 PM 1:13

CLERK OF COURT

DATE RECEIVED FROM

GRAND JURY

ARREST WARRANT NUMBER

✓ 2015A2620601387

CDR: 0162 16-03-0654

DOA: 6/23/2015

ACTION OF GRAND JURY

TRUE BILL

Jack Smith
Foreperson of Grand Jury
Date: SEP 17 2015

VERDICT

Foreperson of Petit Jury
Date:

THE STATE

VS.

✓ Alqi Dhimo
W/ M
37Th Ave N Apt
Myrtle Beach, SC 29577-2841
DOB: 1964
SSN:

ATTORNEY: John Reuben Long, II

Indictment for

**ATTEMPTED CRIMINAL SEXUAL CONDUCT,
THIRD DEGREE**

Jimmy A. Richardson, II, Solicitor

ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on September 17, 2015, the Grand Jurors of Horry County present upon their oath:

ATTEMPTED CRIMINAL SEXUAL CONDUCT – THIRD DEGREE

CDR: 0162 16-03-0654,16-01-0080

That Alqi Dhimo did in Horry on or about June 22, 2015, attempt to engage in sexual battery with the victim, Jessica Kessler, when the defendant knew or had reason to know that the victim was mentally defective, mentally incapacitated or physically helpless, in violation of Section 16-03-0654, 16-01-0080, S. C. Code of Laws, 1976, as amended and the common law.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR

WITNESSES

H Jones Myrtle Beach Police Department

DOCKET NO. 2015-GS-26-04001

The State of South Carolina

County of Horry

Martin D. Sprafkin

15H02917

COURT OF GENERAL SESSIONS

SEPTEMBER, 2015 TERM

FILED
HORRY COUNTY

2015 SEP 18 PM 1:13

PLEASE DELIVER TO
CLERK OF COURT

DATE RECEIVED FROM
GRAND JURY

ARREST WARRANT NUMBER

✓ 2015A2620601384

CDR: 0091 15-15-0130

DOA: 8/22/2015

THE STATE

VS.

ACTION OF GRAND JURY

TRUE BILL

✓ Alqi Dhimo

W/M

37Th Ave N Apt
Myrtle Beach, SC 29577-2841

ATTORNEY: John Reuben Long, II

Indictment for

INDECENT EXPOSURE

Jimmy A. Richardson, II, Solicitor

ORIGINAL

Paul Smith
Foreperson of Grand Jury

Date: SEP 17 2015

VERDICT

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on September 17, 2015, the Grand Jurors of Horry County present upon their oath:

INDECENT EXPOSURE

CDR: 0091 16-15-0130

That Alqi Dhimo did in Horry County on or about June 22, 2015, willfully, maliciously and indecently expose himself in a public place, on property of others, or to the view of any person on a street or highway, in violation of Section 16-15-0130, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR

WITNESSES

H Jones Myrtle Beach Police Department

DOCKET NO. 2015-GS-26-04002

The State of South Carolina

County of Horry

Martin D. Spratlin

15H02917

COURT OF GENERAL SESSIONS

SEPTEMBER, 2015 TERM

FILED
HORRY COUNTY
2015 SEP 18 PM 1:13
MELANIE HARRIS-JARD
CLERK OF COURT

DATE RECEIVED FROM
GRAND JURY

ARREST WARRANT NUMBER

✓ 2015A2620601388

CDR: 0095 16-03-0910

DOA: 6/23/2015

ACTION OF GRAND JURY

TRUE BILL

THE STATE

vs.

✓ Alqi Dhimo

W/M

37Th Ave N Apt
Myrtle Beach, SC 29577-2841

ATTORNEY: John Reuben Long, II

Indictment for

KIDNAPPING

Jimmy A. Richardson, II, Solicitor

ORIGINAL

NP
7/25/16

Foreperson of Grand Jury

Date: SEP 17 2015

VERDICT

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on September 17, 2015, the Grand Jurors of Horry County present upon their oath:

KIDNAPPING

CDR: 0095 16-03-0910

That Alqi Dhimo did in Horry County on or about June 22, 2015, unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away one , without authority of law, in violation of Section 16-03-0910, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR